Supreme Court, U.S.
FILED

08-66 JUL 14 2008

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NO. 08-

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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July 14, 2008

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CAPITAL CASE

QUESTION PRESENTED

Mr. Davis' request for an evidentiary hearing to examine his new innocence evidence sharply split the Supreme Court of Georgia. Since Mr. Davis' murder conviction, seven of nine State witnesses have recanted their trial testimony, and several new witnesses have identified or implicated a different individual, Redd Coles, as the shooter. A bare majority of four Georgia Supreme Court Justices denied Mr. Davis' motion for new trial and evidentiary hearing, citing a procedural requirement that witness recantations could never be material unless extrinsic evidence could show that the trial testimony of each recanting witness was the "purest fabrication" and that each piece of new evidence, standing alone, could prove Petitioner's innocence. Three of the seven justices argued that this case illustrates that the State's procedures for motions for new trial based on new evidence are "overly rigid and fail[] to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, in this case, might be put to death." App. A at 17a.

The questions presented are:

1. Does the Eighth Amendment to the U.S. Constitution create a substantive right of the innocent not to be executed so as to invoke the procedural requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution when substantial evidence of innocence is discovered?

2. Alternatively, the Due Process Clause of the Fourteenth Amendment protects State-created liberty interests when State law mandates a decision favorable to an individual based on a set of substantive predicates. Georgia law creates an Extraordinary Motion for New Trial that mandates a new trial

based on newly-discovered evidence if the defendant can show that the new evidence meets six substantive predicates. Does Georgia's Extraordinary Motion for New Trial create a liberty interest protected by procedural due process?

3. If either the Eighth Amendment or Georgia law creates a liberty interest protected by the Due Process Clause, does the Supreme Court of Georgia's failure to grant an evidentiary hearing to review the cumulative substance and credibility of Mr. Davis' admissible new innocence evidence violate the procedural requirements of the Due Process Clause?

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Appendix B -- Order Denying Extraordinary Motion For New Trial And Motion For Stay Of Execution By The Superior Court Of Chatham County Georgia Dated July 13, 2007

PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Davis respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of Georgia or a remand to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations of State witnesses.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, App. A, is reported at 283 Ga. 438, 660 S.E.2d 354 (2008). The opinion of the Superior Court of Chatham County Georgia, App. B, is unreported.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was entered on March 17, 2008. *See* App. A. The Supreme Court of Georgia denied Mr. Davis' Motion for Reconsideration on April 14, 2008. *See* App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment of the United States Constitution states, in relevant part: "nor cruel and unusual punishments inflicted."

GA. CODE ANN. § 5-5-23 (2008) states: "A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial."

GA. CODE ANN. § 5-5-41(b) (2008) states, in relevant part: "[N]o motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case."

INTRODUCTION

The Supreme Court of Georgia's decision presents an important question concerning the process due in capital cases when new evidence is acquired.

With the advent of DNA testing methods, the possibility of wrongful executions has been reduced and the causes of wrongful convictions have become more evident. Most convictions of prisoners later found to be innocent have resulted from eyewitness misidentification, false confession and perjury. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2545 (2006) (SOUTER, J., *dissenting*). Petitioner's case is a classic example of the unreliability of eyewitness testimony. Both the State and Petitioner agree that the murder was committed by one of two men: Mr. Davis or State witness Sylvester "Redd" Coles in a dimly-lit parking lot in the dark, early hours of the morning. New evidence has come to light that questions the core of the State's case in the form of eyewitness recantations, improper police tactics and testimony from multiple affiants that Redd Coles committed the murder. Yet, no court has ever examined Petitioner's new evidence to determine if he is innocent.

The number of DNA exonerations averaged twenty per year between 2000 and 2003,[1] and there is no reason to believe that the rate of wrongful convictions is lower in cases where DNA evidence is not available. When DNA evidence is not available, as it is not in this case, courts must resort to more judicial assurances of guilt by examining new evidence that has come to light since trial and testing its credibility. Since not all cases involve forensic evidence, courts must fulfill their duties as fact finders when petitioners present substantial non-forensic evidence of innocence. In this case, however, the State courts adopted procedures that rejected Mr. Davis' new recantation evidence without an evidentiary hearing.

This Court should grant certiorari to consider if either the State-created liberty interest in a new trial or the Eighth Amendment invokes the protections of procedural due process when a defendant in a capital case presents substantial new admissible evidence of innocence.

STATEMENT OF THE CASE

Petitioner appeals the denial of his Extraordinary Motion for New Trial filed pursuant to GA CODE ANN. §§5-5-23; 5-5-41(b) (2008).

In the early morning hours of August 19, 1989, Officer Mark MacPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Redd" Coles began harassing a homeless man for a beer while Mr. Davis and others watched quietly from a distance. Coles verbally harassed and chased the homeless man to a nearby parking lot where Officer MacPhail was working. Coles threatened the retreating homeless man by exclaiming:

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[1] *See* Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523 (2006).

"You don't know me. Don't walk away from me. I'll shoot you." Mr. Davis and others silently followed the scuffle. During the altercation, the homeless man was struck on the head with a pistol and yelled for help. Officer MacPhail responded and was shot dead with a .38 caliber weapon by the same man who had pistol-whipped the homeless man. The parking lot was dark and the scene was chaotic. After the dust settled, the police took the statements of several onlookers but had no suspects. Redd Coles and Mr. Davis were both African-American males of similar age, height and weight.

The day after the shooting, another homeless man discovered a spent shell from a .38 caliber revolver near the scene of the murder. The shell was similar to -- and later found to match -- shell casings recovered near a shooting that occurred earlier that evening at a pool party not far from where Officer MacPhail was killed. The two hosts of the pool party confirm that Redd Coles was at the party. Mr. Davis was also at the party, but he was not with Coles. The pool party shooting occurred when four boys -- two of whom were Coles' neighbors -- were shot at as they drove away from the party. One of the car's passengers was shot in the face. Later that evening, as Coles' sister testified at trial, Coles got into a heated argument with Joseph Blige, one of the teenagers riding in the car. Although excluded from trial as hearsay, Coles' sister's police statements show that Blige exclaimed to Coles "I know y'all tried to kill me." Coles later admitted to carrying a .38 caliber revolver on the night of the shootings, but claimed that it was lost when the police attempted to recover the gun for testing. None of the boys riding in the car knew Mr. Davis or identified him as the pool party shooter; the police search of Davis' house less than 24 hours after the shooting turned up no gun.

After the police swarmed his neighborhood looking for suspects, Redd Coles and his attorney approached the

police to exonerate Coles and implicate Troy Davis. Before discovering that Coles had lied about carrying a .38 caliber gun – the same caliber as the murder weapon – on the night of the murder, the police had issued an arrest warrant for Davis without corroborating any part of Coles' story. After the warrant issued, Mr. Davis' picture was plastered on wanted posters and in the local Savannah media.

The police never searched Coles' house for the murder weapon, never included Coles' picture in witness photo spreads and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment."

A jury convicted Mr. Davis of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested almost completely on the testimony of several witnesses, including Redd Coles.

All of the State witnesses -- save Redd Coles and Steve Sanders who first identified Mr. Davis at trial -- have recanted their testimony, claiming police coercion or questionable interrogation tactics (*e.g.*, showing the witness a single photo of Mr. Davis and asking if he was the shooter). Five new witnesses have now implicated Coles, not Troy Davis, in the murder of Officer MacPhail. One of these eyewitnesses has sworn that he was near the crime scene and saw Redd Coles shoot MacPhail. Another witness states she saw Coles hiding a gun in an empty house soon after the shootings. Three additional witnesses have stated that, since trial, Redd Coles has admitted to killing Officer MacPhail and escaping punishment.

The only remnants of the State's case against Petitioner are the self-serving testimony of Redd Coles and

Steve Sanders' dubious in-court identification of Mr. Davis that occurred two years after the crime.[2]

Following his state direct appeals and collateral review, Mr. Davis filed a petition for writ of habeas corpus in 2001, arguing that his innocence evidence allowed the habeas court to review his otherwise-defaulted constitutional claims. The habeas court refused to examine Mr. Davis' innocence claim or grant an evidentiary hearing. The Court of Appeals for the Eleventh Circuit affirmed the habeas court's decision, holding that habeas courts may reach the merits of constitutional claims without an examination of a petitioner's innocence claim.

Immediately after his federal habeas appeals, Mr. Davis filed for an Extraordinary Motion for New Trial provided for under Georgia law. The trial court rejected Mr. Davis' motion and refused to hold an evidentiary hearing, citing procedures that categorically reject recantation evidence without regard to its substance or credibility. A bare majority of the Supreme Court of Georgia affirmed, finding that an evidentiary hearing was unnecessary because State procedural rules for Extraordinary Motions for New Trial bar recantations unless extrinsic evidence shows that each recanting witness' trial testimony was the "purest fabrication." The court examined Mr. Davis' non-recantation evidence piecemeal and without reference to the cumulative effect of all of the evidence.

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[2] As of the date of this petition, Petitioner's counsel has been unable to interview Mr. Sanders. Sanders' police statement on the night of the shooting that he would not "recognize the shooter" directly contradicts his testimony two years later when he identified Mr. Davis for the first time at trial.

REASONS FOR GRANTING THE PETITION

Mr. Davis contends that both the Eighth Amendment and Georgia's Extraordinary Motion for New Trial create a liberty interest that requires the minimum due process of an evidentiary hearing in the State trial court to assess the cumulative effect of all his innocence evidence, including the State witness recantations.

I. Mr. Davis' Case Presents An Ideal Vehicle For this Court to Decide an Issue of Great Constitutional Import: Whether The Eighth Amendment Prohibits the Execution of the Innocent

Mr. Davis' case allows this Court an opportunity to determine what it has only before assumed: that the execution of an innocent man is constitutionally abhorrent. The Court need only determine if the Eighth Amendment bars execution of the innocent and then decide (*see infra* at III) whether Georgia's Extraordinary Motion for New Trial procedures afford sufficient due process protection. *Cf. Panetti v. Quarterman*, 127 S.Ct. 2842 (2007) (recognizing Eighth Amendment bars the execution of the insane, then finding that the State court procedures failed to provide the minimal due process for petitioner who had shown a "substantial threshold showing of insanity"); *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (same for State executive procedures).

The Eighth Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This Court takes into account "objective evidence of contemporary values before determining whether a particular punishment comports with fundamental human dignity that the [Eighth]

Amendment protects." *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality).

The "objective evidence of contemporary values" that informs the Eighth Amendment are evidenced in many ways. Public opinion, *Weems v. United States*, 217 U.S. 349, 378 (1910), jury verdicts, *McGautha v. California*, 402 U.S. 183, 199 (1971), and legislation, *Penry v. Lynaugh*, 492 U.S. 302 (1989), can all reflect the evolving standards of a maturing society. This Court has often looked to state statutes to determine contemporary values for purposes of Eighth Amendment analysis. *See Kennedy v. Louisiana*, --- S.Ct. ----, 2008 WL 2511282, *13 (2008) (citing cases). A consensus of State laws on the issue "is entitled to great weight." *Id.* at 18. Additionally, this Court has found that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378.

In the fifteen years since *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the basis for this Court's Eighth Amendment analysis has eroded. In *Herrera,* this Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Id.* at 417. The Court in *Herrera* based its Eighth Amendment analysis on the idea that "constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person." *Id.* at 398-99. And it held that "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J. *concurring*).

Since *Herrera* was decided, the country has become skeptical of the infallibility of our criminal system as shown by State statutory enactments and public opinion. The impact

of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. Since 1989, there have been 218 post-conviction DNA exonerations. When *Herrera* was decided in 1993, DNA had proven only 15 convictions to be erroneous.[3] Eyewitness misidentification testimony was a factor in 77 percent of post-conviction DNA exoneration cases, making it the leading cause of these wrongful convictions.[4]

Since *Herrera* and the influx of DNA exonerations, the States have come to a general consensus that criminal trials are imperfect. Starting in 1994 (one year after this Court's decision in *Herrera*), the vast majority of States have enacted statutes mandating DNA testing for the potentially innocent. Now, forty states, the District of Columbia and the United States have DNA statutes that mandate that courts compel DNA testing if the results would have a sufficient exculpatory effect.[5] Another three states have a State

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3 *See* www.innocenceproject.org/know; Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523, 555 (2006).

4 *See* www.innocenceproject.org/Content/351.php

5 See 18 U.S.C. 3600(a)(6)-(8) (2008); ARIZ. REV. STAT. ANN. § 13-4240(A)-(B) (2008) ; ARK. CODE ANN. § 16-112-202(6)-(8) (West 2008) ; CAL. PENAL CODE § 1405 (West 2008) ; CONN. GEN. STAT. ANN. § 54-102kk(b) (West 2008) ; DEL. CODE ANN. tit. 11 § 4504 (2008) (requiring tests if the statutory requirements are met, as interpreted by Anderson v. Delaware, 831 A.2d 858, 865 (Del. Super. Ct. 2003)); D.C. CODE § 22-4133(d) (2008); GA. CODE ANN. § 5-5-41(c)(7) (2008) ; HAWAII REV. STAT. § 844D-123(a) (2008) ; IDAHO CODE ANN. § 19-4902(d)(2008) ; 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008) ; IND. CODE ANN. § 35-38-7-8 (West 2008; id. § 35-38-7-9 (2008); IOWA CODE ANN. § 81.10(2)(e) (West 2008) ; KAN. STAT. ANN. § 21-2512(c) (2008) ; KY. REV. STAT. ANN. § 422.285(1)-(2) (West 2008) ; LA. CODE CRIM. PROC.

(Continued...)

constitutional requirement or common law procedure to determine if DNA testing is mandatory.[6]

The fact that forty-seven U.S. jurisdictions have developed mandatory DNA procedures in the wake of 218 DNA exonerations shows a post-*Herrera* general consensus that the criminal system is fallible. The impact of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. *Herrera's* assumptions that "our society has a high degree of confidence in criminal trials" and that existing constitutional protections "have the effect of ensuring against the risk of convicting an innocence person" are plainly contrary to the large number of recent exonerations, contemporary norms and

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ANN. art. 926.1(A)(1)-(2) (2008) ; ME. REV. STAT. ANN. tit. 15 § 2138 (2008) ; MD. CODE. ANN., CRIM. PROC. § 8-201(c) (West 2008) ; MINN. STAT. ANN. § 590.01 (West 2008) ; MO. REV. STAT. § 547.035(7) (West 2008) ; MONT. CODE ANN. § 46-21-110 (2008) ; NEB. REV. STAT. § 29-4120(5) (2008) ; NEV. REV. STAT. ANN. 176.0918(5)(a) (West 2008) ; N.J. STAT. ANN. § 2A:84A-32a(4)-(5) (West 2008) ; N.M. STAT. ANN. § 31-1A-2(C) (West 2008) ; N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2008) ; N.C. GEN. STAT. ANN. § 15A-269(a) (West 2008) ; N.D. CENT. CODE § 29-32.1-15(3) (2008) ; OHIO REV. CODE ANN. § 2953.71-.84 (West 2008) ; OR. REV. STAT. ANN. § 138.692(2) (West 2008) ; PA. CONS. STAT. ANN. § 9543.1 (West 2008) ; R.I. GEN. LAWS § 10-9.1-12(a)-(b) (2008) ; TENN. CODE ANN. § 40-30-304 (West 2008) ; TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2008) ; UTAH CODE ANN. § 78-35a-301(6)(b) (West 2008) ; VT. STAT. ANN. tit. 13 § 5566 (2008) ; VA. CODE ANN. § 19.2-327.1(D) (West 2008); WASH. REV. CODE ANN. § 10.73.170(3) (West 2008); W. VA. CODE ANN. § 15-2B-14(e) (West 2008) ; WIS. STAT. ANN. § 974.07(7)(a)(2) (West 2008) ; FLA. R. CRIM. P. 3.853 ;. see also OKLA. STAT. ANN. tit. 22 § 1371.1-1371.2 (West 2008).

[6] *See Osborne v. Alaska*, 110 P.3d 986, 995 (Alaska Ct. App. 2005); *Lambert v. Mississippi*, 777 So.2d 45, 49 (Miss. 2002); *Davis v. Class*, 609 N.W.2d 107 (S.D. 2000).

public opinion. *Herrera*, 506 U.S. at 398, 420. For example, the Harris polling agency has stated that:

> There is one issue almost all Americans agree on – ninety-five percent of U.S. adults say that sometimes innocent people are convicted of murder while only five percent believe that this never occurs. This is a number that has held steady since 1999. Among those who believe innocent people are sometimes convicted of murder, when asked how many they believe are innocent, the average is 12 out of 100 or twelve percent.[7]

Forty-six States have enacted mandatory DNA testing in possible innocence cases. Ninety-five percent of Americans believe the innocent are often convicted and at least 218 persons have been wrongly convicted. Such "objective evidence" shows that this Court must revisit its analysis in *Hererra* and conclusively hold that the Eighth Amendment bars the execution of defendants with substantial reliable innocence evidence acquired since trial.

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[7] *See www.harrisinteractive.com/harris_poll/index.asp?PID=882 The Harris Poll* was conducted by telephone within the United States between February 5 and 11, 2008 among a nationwide cross section of 1,010 adults (aged 18 and over). Similarly, in a 2000 poll conducted for Newsweek by Princeton Survey Research Associates found that 82% of those polled agreed that "states should make it easier for Death Row inmates to introduce new evidence that might prove their innocence, even if that might result in delays in the death penalty process?" *See* www.pollingreport.com/crime.htm.

II. Georgia's Extraordinary Motion for New Trial Creates A Liberty Interest In A New Trial That Requires Fundamentally Fair Due Process Under the Fourteenth Amendment

Liberty interests protected by the Fourteenth Amendment may arise from State law. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court has found State-created liberty interests for prisoners, including -- among others -- the rights to: parole,[8] good-time credits for satisfactory behavior,[9] and the freedom from involuntary transfer to a mental hospital.[10] State-created liberty interests protected by the Due Process Clause are found in "statutes or other rules defining the obligations of the [State authority charged with granting the liberty interest]." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *see also Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980) (finding prisoner's liberty interest in right to be free from mental hospital transfer was derived from "state law and official penal complex practice" as well as the U.S. Constitution.)

State law creates a liberty interest protected by the Due Process Clause by mandating a certain individual right or benefit once certain "substantive predicates" have been met. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 10 (1979) (liberty interest created under State law where "there is [a] set of facts which, if shown, mandate a decision favorable to the defendant."); *Board of Pardons v. Allen*, 482 U.S. 369 (1987) (same). In *Greenholtz* and *Allen*, this Court

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[8] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

[9] *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[10] *Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980).

found that the State parole statutes at issue created a due process liberty interest in release from prison. *See Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. The State parole statutes created a protected liberty interest by conferring "broad discretion" upon the state parole boards to make parole decisions using prescribed substantive predicates that, once satisfied, mandated a certain result (conditional release from prison). *Id.* at 375 (interpreting *Greenholtz*).

Since the State parole boards had to make a "necessarily subjective" decision using substantive predicates that could "not be applied mechanically," the process by which those decisions were made required fundamentally fair due process. *See id.* at 375-376 (interpreting *Greenholtz*). Since parole was mandatory upon a favorable determination of substantive predicates, release from prison was more than a mere unilateral hope, but a constitutionally protected expectation. *See id.* at 375-376 (interpreting *Greenholtz*).

Although determinations of whether a State statute creates a constitutionally protected liberty interest are questions of federal law, this Court defers to State court interpretations in determining whether the State statue at issue is mandatory. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In *Greenholtz*, the Court noted with regret that it was denied the benefit of the Nebraska courts' interpretation of whether the State law at issue was mandatory. 442 U.S. at 12 (citing approvingly); see also *Allen*, 482 U.S. at 369, 377 n. 8 (implying that a Montana Supreme Court interpretation of whether the relevant parole statute was mandatory would have been instructive if there had been a decision on point).

Here, Georgia State law grants Mr. Davis a liberty interest in a new trial. Georgia's Extraordinary Motion For New Trial mandates a new trial if the defendant can show

new evidence that meets six substantive predicates.[11] Although the relevant statute provides that a new trial "may be granted,"[12] the controlling interpretation of the Georgia Supreme Court is that:

> While the statute states that a new trial 'may be granted,' this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial *must* be granted." *Bell v. State*, 227 Ga. 800, 805, 809, 183 S.E.2d 357, 362 (1971) (*citing Werk v. Big Bunker Hill Mining Corp.*, 193 Ga. 217, 228, 17 S.E.2d 825 (1941); *Matthews v. Grace*, 199 Ga. 400, 405, 34 S.E.2d 454, 457 (1945)) (emphasis added).

Georgia law prescribes six substantive predicates for the trial judge to determine whether a new trial must be granted. It is incumbent on a defendant to show: "(1) the newly discovered evidence has come to [the defendant's] knowledge since the trial; (2) want of due diligence was not the reason that the evidence was not acquired sooner; (3) the evidence was so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the affidavit of the witness is attached to the motion or its absence accounted for; and (6) the new evidence does not operate

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[11] Due process protections do not turn on whether State law uses a shall/unless formula. *Board of Pardons v. Allen*, 482 U.S. 369, 378 (1987) (finding state parole statute mandatory for purposes of due process protection where the statute mandated release "if" or "when" the substantive predicates had been found.).

solely to impeach the credit of a witness." *Bell v. State*, 227 Ga. 800, 805, 183 S.E.2d 357, 360-61 (1971).

These predicates for a new trial require the same -- if not more -- subjective discretion as required by the parole statutes at issue in *Greenholtz* and *Allen*.[13] The trial court must determine the nature of the evidence, compare it to the evidence adduced at trial and judge whether the new evidence would materially affect the jury's verdict. *Id.* Similar to the relevant factors for parole in *Allen* and *Greenholtz*, Georgia cases show that the predicates for a new trial cannot "be applied mechanically." *See, e.g., Bell*, 227 Ga. at 807 (the materiality element "cannot be reduced to a mathematical probability"). Instead, Georgia courts are tasked to make "necessarily subjective" credibility determinations of new witnesses and weigh the probative effect of new evidence.

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[13] In *Allen*, the Montana parole statute at issue mandated parole "Subject to the following restrictions ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community ... A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. ... A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." 482 U.S. at 376 (quoting Mont.Code Ann. § 46-23-201 (1985)).

In *Greenholtz*, the Nebraska parole statute mandated parole unless "(a) there is a substantial risk that he will not conform to the conditions of parole; (b) his release would depreciate the seriousness of his crime or promote disrespect for law; (c) his release would have a substantially adverse effect on institutional discipline; or (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." The statute also set forth a list of 14 factors that the Nebraska parole board must consider in reaching a decision. *Greenholtz*, 442 U.S at 11-129 (quoting Neb.Rev.Stat. § 83-1, 114(1) (1981)).

See, e.g., *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1983) (assessing the credibility of a recanted State witness' testimony given at an evidentiary hearing); *Humphrey v. State*, 207 Agape. 472 (475), 428 S.E.2d 362, 364 (1993) (finding an abuse of discretion for the trial court to "pass[] upon the credibility" of a exculpatory new witness).

The liberty interest in a new trial created by Georgia law is more substantial than other State-created interests this Court has recognized. In *Wolff, Greenholtz and Allen*, this Court recognized that the loss of good-time credits for early release or the possibility of parole implicates a State-created liberty interest even though the forfeiture only deprived the prisoner of freedom he expected to obtain sometime in the future.[14] Mr. Davis' State-created liberty interest in a new trial is more substantial than an interest in parole. If, after an evidentiary hearing, the trial court determines Mr. Davis' new evidence meets the six substantive predicates, Mr. Davis' conviction must be overturned. Mr. Davis will enjoy the rights and benefits of the accused, which include the right to pre-trial release (or at least non-punitive pre-trial incarceration), the right of presumed innocence, the right to counsel and the right to have a jury of his peers determine whether he is guilty beyond a reasonable doubt.

Unlike the reversal of a conviction, parole -- the liberty interest at issue in *Greenholtz* and *Allen* -- does not affect the prisoner's conviction but instead is only "an established variation on imprisonment of convicted criminals" that allows for release from prison "on the condition that the prisoner abide by certain rules during the balance of the

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[14] In *Wolff v. McDonnell*, this Court held that the State created a liberty interest by mandatory statute that provided for good time credits toward early release. 418 U.S. at 557.

sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972). Parole necessarily restricts a parolee's liberty "substantially beyond" those who have not been convicted of a crime, and the Constitution does not entitle parolees to "the full panoply of rights due a defendant" when the State seeks re-incarceration through parole revocation. *Id.* at 478, 480.

By contrast, the liberty interest at issue in this case involves the imminent execution of an inmate in spite of the existence of new innocence evidence that has never been tested in a hearing. The State-created liberty interests in *Wollf, Greenholtz* and *Allen* involved only the expectation for conditional release from prison. Here, Georgia law creates an expectation that the innocent will not be executed upon a showing of newly-discovered material evidence that meets certain substantive criteria.

A. This Court Should Decide Whether A Positivist Approach to Finding State-Created Rights Is Still Viable After Sandin

This Court should clarify the analytical framework applied to determine when State-created rights require due process protections.

In *Wolff, Greenholtz*, and *Allen*, discussed *supra*, the Court recognized that the liberty interests protected by procedural due process can be created by State law. In *Wolff*, inmates earned good time credits under a State statute that mandated sentence reductions for good behavior revocable only for "flagrant or serious conduct." 418 U.S. at 545-546. Although the Due Process clause itself did not create a liberty interest in good time credits, this Court found that a mandatory State statute created an interest in a "shortened prison sentence" that was protected by due process. *Id.* at 557. This Court characterized the prisoner's State-created expectation of a shortened prison sentence as a liberty interest with "real substance." *Id.* at 557.

After *Wolff*, this Court in *Greenholtz* and *Allen* found that nearly identical mandatory State parole statutes created a protected liberty interest in conditioned release by using "language of an unmistakably mandatory character" subject to discretion set out in "specified substantive predicates." *Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. In *Allen*, this Court went on to note that parole decisions implicated an interest "at the heart of the liberty protected by the Due Process Clause." *Allen*, 482 U.S. at 373 n.3. Unlike in *Wolff* and *Allen*, this Court in *Greenholtz* did not analyze whether the expectation created by State law was a liberty interest of "real substance" or "at the heart" of due process.

After *Greenholtz* and *Allen* were decided, this Court and the lower federal courts wrestled with various mandatory State statutes and regulations to determine whether due process extended to relatively mundane aspects of prison life, including rights associated with visitation privileges, tray lunches, paperback dictionaries and the provision of electrical outlets for televisions.[15] The liberty interests involved in these cases were far from substantial. Hence, it was not surprising that the Court in 1995 held that "the time has come to return to the due process principles we believe were correctly established in *Wolff* ..." when interpreting State-created liberty interests. *Sandin v. Conner*, 515 U.S. 472, 483 (1995).

In *Sandin v. Conner*, this Court altered the analytical framework to be used to determine State-created liberty interests. The prisoner in *Sandin* challenged his 30-day solitary confinement, arguing that a mandatory State prison regulation created a liberty interest in being free from disciplinary segregation. *Id.* at 476. In overturning the Court

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[15] *See Sandin v. Conner*, 515 U.S. 472, 483 (1995).

of Appeals decision, this Court explicitly eschewed *Greenholtz*'s use of the mandatory/discretionary analysis of State law. Instead of focusing on the mandatory language of the State regulation at issue this Court held that States "under certain circumstances" create liberty interests entitled to due process but that those interests "will be generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or "inevitably affect[s] the duration of his sentence." *Id.* at 484, 487.

Sandin did not overturn the mandatory/discretionary framework used in *Greenholtz* and *Allen* but found that due process protected only State-created liberty interests of "real substance." The Court characterized the mandatory/discretionary determination as a "somewhat mechanical dichotomy" that failed to look at "whether the State created an interest of 'real substance' comparable to the good time credit scheme of *Wolff*." *Id.* at 479-80. What is telling is that after Court found that *Greenholtz*'s mandatory/discretionary analysis was misguided, it approvingly cited *Allen* for the proposition that "we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Id.* at 484. *Sandin's* explicit rejection of *Greenholtz's* analysis and its favorable citation to *Allen* 's application of the same mandatory/discretionary framework to nearly identical parole statutes can only be explained by the sole difference between those opinions: *Allen* ensured that the State-created liberty interest was "at the heart" of due process while *Greenholtz* confined its analysis to the State statute.

Recently in *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court once again addressed the issue of the mandatory/discretionary framework. This Court reiterated that "after *Sandin*, it is clear the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the

language of regulations regarding those conditions . . .." *Id.* at 223. In *Wilkinson* this Court noted that "in *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure" whether a hardship imposed on a prisoner amounts to a due process violation. *Id.* at 223. While acknowledging that inconsistencies were already apparent across the circuits, this Court declined to define further the baseline for determining whether a liberty interest exists for certain conditions of confinement, or to elaborate further on the breadth of *Sandin*'s reach. *Id.*

Circuit courts have had difficulty in deciding whether *Sandin* supplants or supplements the mandatory/discretionary framework previously utilized to determine the existence of a liberty interest protected by due process. Read narrowly, *Sandin* found only that the mandatory/discretionary analytical framework is "a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officers in the administration of a prison . . . [as] such regulations are not designed to confer rights on inmates." *Sandin*, 515 U.S. at 481-82. More broadly, however, *Sandin* sharply criticized the positivist approach to determining State-created liberty interests and advocated for a return to the natural rights theory of due process.

Perhaps the most illustrative case on point, *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996), discussed both the issue of whether *Sandin* applies in the parole context, as well as the proper analysis for determining if a due process right exists with regard to parole. The court in *Ellis* re-stated the proposition set forth in *Greenholtz* and *Allen* that the language of certain state-promulgated statutes and regulations could give rise to a state-created liberty interest. *Id.* at 1417. However, after the decision in *Sandin*, the court noted that "where the Supreme Court stands on this subject is no longer certain." *Id.* The court discussed the *Sandin* test and how it appeared "ill-fitted to parole eligibility

determinations" and went on to pose the question, "where does this leave us?" *Id.* at 1418. Ultimately, the court held that the tests set forth in *Greenholtz* and *Allen* were still applicable "until the court instructs us otherwise." *Id.*

As the Court held in *Wolff*, "the State having created the right [and] the prisoner's interest ha[ving] real substance," he is entitled to "those minimal procedures appropriate under the circumstances ... to insure that the State-created right is not abrogated." 418 U.S. at 557.

III. Procedural Due Process Requires That Mr. Davis Have the Opportunity to Present Witnesses to the State Trial Court in an Evidentiary Hearing

The procedural safeguard proposed by Mr. Davis to protect his Eighth Amendment or State-created interest is simple: an evidentiary hearing in the State trial court to assess the cumulative materiality and credibility of his new innocence evidence. Whether Mr. Davis' liberty interest arises from the Eighth Amendment or Georgia State law, the Due Process Clause of the Fourteenth Amendment requires that the State trial court hold a hearing.

Due process analysis provides that once the Court has determined that the U.S. Constitution or State-law creates a due process requirement by recognizing a protected liberty interest, the question becomes "what process is due." *Morrissey*, 408 U.S. at 481. The cornerstone for all analysis of procedural adequacy has become Justice Powell's opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* requires consideration of three distinct factors: (1) the private interest that will be affected by the State action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the State's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

A. Application of the Mathews Factors Shows that an Evidentiary Hearing is the Minimum Due Process Required

Mr. Davis' private interest in his Extraordinary Motion for New Trial proceedings -- the first *Mathews* factor -- is weighty. Simply put, Mr. Davis' motion for new trial proceedings determines whether he will live and be free or die. No interest could be more important. *See Wolff*, 418 U.S. at 560 (finding that the deprivation of good time credits for early release "are unquestionably a matter of considerable importance" for *Mathews*-balancing purposes); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) (Marshall, J.) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

The second *Mathews* factor addresses (a) the risk of an erroneous execution under the current procedures in place to evaluate an Extraordinary Motion for New Trial and (b) the probable value of an evidentiary hearing to consider Mr. Davis' new evidence, including the recantations of seven State witnesses.

The "lodestar" of any effort to devise a procedure when the defendant's life is at stake is the "clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution." *See Ford*, 477 U.S. at 424 (1986) (Powell, J. *concurring* in the order of an evidentiary hearing on the question of petitioner was competent to be executed). When the stakes are so high, "it is

all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Id.* at 417.

In *Ford*, Justice Powell's controlling opinion found that Florida's refusal to consider relevant evidence of insanity before an execution of a defendant who had made a substantial showing of incompetence violated due process. *Id.* The Florida statute at issue left insanity determinations to its Governor. *Id.* at 424. Florida's Governor had a stated policy of excluding from his consideration any evidence submitted by the prisoner. *Id.* This Court held that Florida's fact-finding procedure to exclude a prisoner's insanity evidence from consideration "invites arbitrariness and error ... [and] does not, therefore, comport with due process." *Ford*, 477 U.S. at 424.

Similarly in *Panetti*, the Court recently held that the procedures used by a State court to determine insanity violated due process by failing to allow the defendant to submit relevant evidence (expert psychiatric evidence). *Panetti v. Quarterman*, 127 S.Ct. at 2842, 2857-58 (2007). The exclusion of relevant evidence which was sure to "invite arbitrariness and error" in the state court's competency determination and, thus, violated due process. *Id.*

Here, Georgia's Extraordinary Motion for New Trial procedures creates a substantial risk of an arbitrary and erroneous execution by excluding recantation evidence without regard to its credibility or substance. The Supreme Court of Georgia held that recantation evidence is immaterial unless the defendant can show that the recanted witness' trial testimony was the "purest fabrication" by "extrinsic proof that the witness' prior testimony was physically impossible." App A at 6a. As the Georgia Supreme Court dissenting opinion stated, application of majority's "categorical rule" against recantation evidence "fails to allow an adequate inquiry into

the fundamental question, whether or not an innocent person might have been convicted or even, as in this case, might be put to death." App. A at 17a.

In barring relevant recantation evidence, the Supreme Court of Georgia confuses materiality with reliability. Materiality is a well-defined legal concept. This Court has held that evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Georgia courts have held that materiality turns on whether the evidence would "probably produce a different verdict." *Bell*, 227 Ga. at 805. It follows that a recantation lacks materiality only if it has been determined to be unreliable. Otherwise, a reliable recantation may sufficiently undercut the evidence at trial so as to "undermine the confidence in the verdict" or "probably produce a different verdict." Neither the trial court nor the Supreme Court, however, concluded that Mr. Davis' recantation evidence was unreliable. To do so would have required an evidentiary hearing or at least a facial evaluation of the affidavits' credibility.

Any trustworthy fact-finding procedure must require cumulative analysis of "all the evidence." The trial court and the Georgia Supreme Court exacerbated the risk of an erroneous execution by considering each piece of Mr. Davis' new evidence in isolation. This Court has repeatedly instructed that federal habeas courts evaluate new innocence evidence cumulatively, requiring "a holistic judgment about all the evidence." *House v. Bell*, 547 U.S. 518, 538-40 (2007). It is clear that this Court believes that review of innocence evidence "in isolation" from other exculpatory evidence might allow courts to make erroneous innocence determinations. *See id.* at 552 (finding that the victim's husband's post-trial demeanor and actions might have been

erroneously disregarded if "considered in isolation" from other exculpatory evidence).

However, the trial court and the Georgia Supreme Court did just what this Court cautioned against in *House*. The Georgia Supreme Court considered each of Mr. Davis' sixteen affidavits in isolation, dismissing each one as immaterial because none, standing alone, conclusively proved Mr. Davis' innocence. *See generally* App A; *see*, e.g., at 7a (rejecting evidence because "even if the recantations of Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was [innocent]"). Had either court considered the evidence cumulatively, both courts would likely have seen that each recantation is reinforced by recantations of other unrelated witnesses and that the recantations, in turn, are reinforced by four affidavits implicating Redd Coles as the shooter.

The need and probable value of an evidentiary hearing -- part (b) of *Mathews'* second factor -- is also shown by the Georgia Supreme Court's inaccurate *obiter dictum* observations about Mr. Davis' new evidence. After holding that the recantation evidence was immaterial *per se*, the court observed that "most" of Mr. Davis' recantation affidavits were merely statements that the eyewitness "now do not feel able to identify the shooter." App. A at 15a. The majority's mistake is an error attributable to the lack of an evidentiary hearing. The submitted affidavits clearly show that none of the four recanting eyewitness (the other 3 recanting witnesses were not eyewitnesses) was able to identify the shooter at trial or on the night of the crime.[16] If the court had the benefit of

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[16] Dorothy Ferrell's affidavit clearly states that she was not able to identify the shooter at trial or on the night of the crime:

(Continued...)

an evidentiary record, it would not have made such erroneous observations.

The State's interests in finality and preserving scarce judicial resources -- the final *Mathews'* factor -- is far outweighed by the potential for an erroneous conviction created by the lack of an evidentiary hearing. This Court or

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> "I didn't see who was doing the shooting, I just heard the gunshots. I didn't want to get up there and [testify] that I saw who did the shooting because I didn't see that part. But I felt like I had to say that."

D.D. Collins' affidavit shows that he "never" saw Mr. Davis do anything:

> "I testified against Troy at his trial. I remember that I told the jury that Troy hit the man Redd was arguing with. That is not true. I never saw Troy do anything to the man."

Larry Young's affidavit shows that he "never" — at trial or the night of the shooting — was able to identify the shooter or what he was wearing:

> "[The Police] kept asking me what had happened at the bus station and I kept telling them that I didn't know. Everything happened so fast down there. I couldn't honestly remember what anyone looked like or what different people were wearing. Plus, I had been drinking that night so I just couldn't tell who did what. ... I was *never* able to make sense of what happened that night. It's as much of blur now as it was then." (emphasis added)

Antoine Williams' affidavit also clearly states that:

> "At Troy Davis' trial, I identified him as the person who shot the officer. Even when I said that, I was totally unsure whether he was the person that shot the officer. I felt pressure to point at him because he was the only one sitting in the courtroom." (emphasis added).

the State court may fashion rules to limit the need for evidentiary hearings to truly substantial innocence cases. In *Ford* and *Panetti*, this Court limited the strain that non-meritorious insanity claims may have on the judicial system by requiring "a substantial threshold of insanity" before requiring a hearing. *Panetti*, 127 S.Ct at 2856 (*citing Ford*, 477 U.S. at 426, 424). Similarly, the facts of this case limit the requirement of a hearing to instances where the defendant faces imminent execution despite substantial new admissible innocence evidence (*i.e.*, recantations from seven of nine State trial witnesses and four new witnesses implicating the alternative suspect who had the motive and means to have committed the crime) that has never been the subject of a State or federal evidentiary hearing. Lastly, Mr. Davis does not request the grant of a new trial at this juncture, but only an evidentiary hearing in State court.

Moreover, State perjury laws have prevented an influx of non-meritorious recantation cases. Georgia law, similar to other States, provides harsh penalties that ensure against spurious recantations, especially in capital cases. *See* GA. CODE ANN. § 16-10-70(b) ("A person convicted of the offense of perjury that was a cause of another's being punished by death shall be punished by life imprisonment."); *see also* § 17-3-2(2) (tolling statute of limitations until government discovers the crime). Thus, it is not surprising that the only Georgia recantation cases that Mr. Davis' counsel could find involved either accomplices who had little to lose after their own convictions or family members (or close relations) of the defendant who had the inclination risk a perjury charge for a loved one.[17] No doubt the State could

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[17] Courts have declared that accomplice testimony is "inherently suspect" because "there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame" after his conviction is final or inevitable. *U.S. v. La*

(Continued...)

fashion a less restrictive recantation rule that eschews accomplice or family member recantations as inherently unreliable.

This Court has found evidentiary hearings designed to protect far less substantial private interests "should not impose a great burden on ant State[]." *See Morrissey*, 408 U.S. at 490 (a hearing required by due process to protect a parolee's interest in continued conditional release would not burden State parole systems, as the State can fashion rules to prevent abusive litigation tactics and the parolee could not re-litigate issues determined in other forums); *Wolff*, 418 U.S. at 566 (requiring a hearing to protect a prisoner's right to good-time credits as long as not "unduly hazardous to institutional safety or correctional goals"). In fact, a study of the case law cited by the Georgia Supreme Court shows that Georgia courts often hold evidentiary hearings to determine credibility issues in cases with far less evidence than presented here.[18]

Duca, 447 F.Supp. 779 (D. N.J. 1978); *see also Steve Davis v. State*, 221 Ga.App. 375, 471 S.E.2d 307 (1996) ("[Accomplice's] attempt to exculpate [Defendant] is inherently suspect. Credibility will almost always be suspect when newly available evidence is the testimony of a fellow participant in the crime who attempts to testify helpfully to a colleague only after his own case has been adjudicated. It comes with little reliability to rescue it from its tainted circumstances."); *U.S. v. Carlin*, 573 F.Supp. 44 (D. Ga. 1983) ("a defendant who now seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial."). Likewise, courts are skeptical of recantations from State witnesses with close relationships with the defendant. *See* Shawn Armbrust, *Reevaluating Recanting Witnesses*, B.C. Third World L.J. 75, 85 (2008).

[18] *See, e.g., Hester v. State*, 282 Ga. 239, 647 S.E.2d 60 (2007) (hearing held based on single out-of-court confession by third-party); *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1982) (hearing held based on one recantation - defendant's accomplice); *Brown v. State*, 209 Ga.App. 314, 433 S.E.2d 321 (1993) (hearing held based on one recantation -

(Continued...)

Lastly, the public interest in ensuring that the innocent are not executed is a substantial factor that a simple hearing would vindicate. *See, e.g., Morrissey*, 408 U.S. at 484 (finding that societal interests are relevant for *Mathews* balancing). As previously discussed, the public has become increasingly pessimistic about the accuracy of the judicial system as many believe that the innocent have been convicted or even executed. DNA exonerations have flamed that fire, proving the fallibility of eyewitness testimony and the abundance of coerced State witnesses. The State's case was made up almost entirely of this type of questionable evidence. Society, thus, has an interest in ensuring that the executed who can produce substantial, admissible new evidence of their innocence are not executed without the opportunity to vindicate themselves through the minimal process required by our Constitution. A hearing to determine the cumulative materiality and credibility of Mr. Davis' new evidence is the minimal process that is due.

CONCLUSION

The petition for a writ of certiorari should be granted or remanded with an order to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations.

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defendant's daughter); *Young v. State*, 269 Ga. 490, 500 S.E.2d 583 (1998) (hearing held based on two out-of-court confessions by third party); *Stroud v. State*, 247 Ga. 395, 276 S.E.2d 597 (hearing held where witness, defendant's girlfriend, renounced immaterial portion of her testimony but did not recant the fact that the defendant confessed to committing the crime); *Crowe v. State*, 265 Ga. 582, 458 S.E.2d 799 (1995) (this Court ordered an evidentiary hearing on single affidavit submitted by the defendant himself).

Respectfully submitted,

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July 14, 2008

APPENDIX

APPENDIX A -- DENIAL OF MOTION FOR RECONSIDERATION AND ISSUANCE OF A SUBSTITUTE OPINION BY THE SUPREME COURT OF GEORGIA DATED APRIL 14, 2008

SUPREME COURT OF GEORGIA
Case No. S07A1758

Atlanta April 14, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

TROY ANTHONY DAVIS v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this appeal, it is ordered that it be hereby denied. The opinion of the Court in the above-styled case issued on March 17, 2008, is withdrawn from the files, and a substitute opinion issued in this case.

It is ordered that the January Term relative to this case is extended until further order of the Court to enable the parties to file a motion for reconsideration within 10 days of the filing date of the new opinion. OCGA § 15-2-4; Haygood v. City of Doraville, 25 Ga. 566, 567 (1986).

All the Justices concur, except Sears, C. J., Hunstein, P. J., and Benham, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and seal of said court hereto affixed the day and year last above written.

s/Lynn M. Stinchcomb, Chief Deputy Clerk

In the Supreme Court of Georgia

Decided: March 17, 2008

S07A1758. DAVIS v. THE STATE.

MELTON, Justice.

Troy Anthony Davis was convicted of murdering Savannah police officer Mark MacPhail[1] and of related crimes. He was sentenced to death for the murder, and this Court affirmed. Davis v. State, 263 Ga. 5 (426 SE2d 844) (1993), cert. denied, 510 U. S. 950 (114 SC 396, 126 LE2d 344) (1993). He filed a petition for writ of habeas corpus in the Superior Court of Butts County, and this Court affirmed the denial of that petition. Davis v. Turpin, 273 Ga. 244 (539 SE2d 129) (2000), cert. denied, 534 U. S. 842 (122 SC 100, 151 LE2d 59) (2001). See also Davis v. Thomas, 266 Ga. 835 (471 SE2d 202) (1996) (reversing the habeas court's denial of a continuance). He filed a federal habeas petition, and his appeals from the denial of that petition failed. Davis v. Terry, 465 F3d 1249 (11th Cir. 2006), cert. denied, ___ U. S. ___ (127 SC 3010, 168 LE2d 728) (2007). After the trial court issued a new order for his execution, Davis filed an extraordinary motion for new trial on July 9, 2007, eight days before the beginning of the week-long period set for his execution. See OCGA § 5-5-41 (b). The trial court denied the extraordinary motion for new trial without conducting a hearing. Davis then filed an application for discretionary

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[1] On direct appeal, this Court adopted the spelling of the victim's name contained in the trial transcripts. We now adopt the spelling that presently appears to be correct.

appeal and a motion for a stay of execution in this Court. While the application was pending, the State Board of Pardons and Paroles granted a temporary stay of execution and scheduled a hearing. On August 3, 2007, this Court dismissed Davis's motion for a stay of execution as moot and granted his application for discretionary appeal. Davis v. State, 282 Ga. 368 (651 SE2d 10) (2007). The State Board of Pardons and Paroles then rescinded its stay of execution and suspended its consideration of Davis's petition for clemency while this Court considers the instant appeal. In light of the following discussion, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial without first conducting a hearing, and, accordingly, we affirm.[2]

1. The evidence at trial authorized the jury to find the following: In the early morning of August 19, 1989, Davis was at a pool hall in Savannah with his friends, Sylvester "Red" Coles and sixteen-year-old Darrell "D.D." Collins. Nearby, a homeless man named Larry Young was exiting a convenience store. Coles asked Young for one of the beers Young had just purchased. When Young refused, Coles followed him up the street, cursing at him. Davis and Collins circled around a bank in an apparent flanking maneuver and joined Coles in surrounding Young. Someone shouted a threat about shooting Young, and Davis came from behind Young and struck him in the head with a pistol,

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[2] We must point out that, contrary to the dissent's implication otherwise, this opinion does not hold and nowhere states that recantations and confessions must be categorically excluded and never considered in cases such as this. Nor do we hold that a trial court has no right to hold a hearing to consider the evidence with which it has been presented. We simply hold that, in dealing with the evidence and in its decision not to hold a hearing, the trial court did not abuse the discretion with which it is empowered by law under the facts of this case.

injuring him badly. Collins fled as soon as Young was struck. Davis and Coles fled immediately afterward when it became obvious that the police were being called. Mark MacPhail, a police officer working off-duty at the nearby bus station and Burger King, began pursuing Davis and Coles and shouted for them to stop. Coles stopped, and MacPhail ran past him. Davis kept running and fired a handgun at MacPhail, who was shot and fell. Davis then stood over MacPhail smiling and fired again. Altogether, MacPhail was shot three times, once in the face, once in the right thigh, and once in the chest.

Earlier on the night of the murder, a man named Michael Cooper was shot while leaving a party. A bullet retrieved from Michael Cooper's body during his medical treatment was similar to bullets from the murder scene. Shell casings retrieved from the two scenes were matched with greater certainty. Testimony at trial identified Davis as the person who shot Michael Cooper.

At trial, Davis's defense centered on the theory that Coles was the murderer. Both Davis and Coles testified, each claiming their innocence. The evidence at trial authorized the jury to conclude beyond a reasonable doubt that Davis was the man who struck Larry Young and shot Officer MacPhail.

2. Because the statutes authorizing extraordinary motions for new trials are silent as to procedural details, "the procedural requirements for such motions are the product of case law." Dick v. State, 248 Ga. 898, 899 (2) (287 SE2d 11) (1982). We have held that a new trial may be granted based on newly-discovered evidence only where the defendant shows each of the following:

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material

> that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake v. State, 246 Ga. 488, 491 (1) (271 SE2d 792) (1980) (punctuation and citations omitted). "Failure to show one requirement is sufficient to deny a motion for a new trial." Id. (emphasis supplied). Extraordinary motions for new trial are "not favored," and a "a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground. " Crowe v. State, 265 Ga. 582, 590-591 (15) (458 SE2d 799) (1995) (punctuation and citation omitted). A trial court's ruling on such a motion "will not be reversed unless it affirmatively appears that the court abused its discretion. [Cit.]" Young v. State, 269 Ga. 490, 491-492 (2) (500 SE2d 583) (1998) (punctuation and citation omitted). For the reasons set forth below, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial without first conducting a hearing, particularly in light of the requirement under Timberlake that newly-discovered evidence be so material that it probably would result in a different verdict, Timberlake, 246 Ga. at 491 (1), and in light of the duty of a defendant to present in the affidavits supporting his or her extraordinary motion for new trial "facts sufficient to authorize that the motion be granted," Dick, 248 Ga. at 899 (2) (emphasis in original).

3. Davis's extraordinary motion for new trial relied primarily on affidavit testimony consisting of four types, recantations by trial witnesses, statements recounting alleged admissions of guilt by Coles, statements that Coles disposed of a handgun following the murder, and an alleged

eyewitness account. We discuss each of these affidavits, which are the ones highlighted by Davis in his brief on appeal, by category below.

A. Recantations by Trial Witnesses

This Court has noted the general lack of credibility that should be assigned to recantation testimony in the context of an extraordinary motion for new trial, stating that such "[d]eclarations made after the trial are entitled to much less regard than sworn testimony delivered at the trial." Norwood v. State, 273 Ga. 352, 353 (2) (541 SE2d 373) (2001) (quoting Johnson v. State, 236 Ga. App. 764, 765 (1) (513 SE2d 291) (1999)). Trial testimony is closer in time to the crimes, when memories are more trustworthy. Furthermore, the trial process itself, including public oaths, cross-examination, and the superintendence of a trial judge, lends special credibility to trial testimony. Accordingly, we have quoted the Court of Appeals as follows:

> "The only exception to the rule against setting aside a verdict[,] without proof of a material witness' conviction for perjury, is where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication." Cit. A recantation impeaches the witness' prior testimony. Cit. However, it is not the kind of evidence that proves the witness' previous testimony was the purest fabrication. See, e.g., Fugitt v. State, [251 Ga. 451 (1) (307 SE2d 471) (1983)] (the evidence offered was extrinsic proof that the witness' testimony was physically impossible; consequently, the trial court was able to determine the truth of the matter without having to take into account the witness' credibility).

Id. See also Drake v. State, 248 Ga. 891, 894 (287 SE2d 180) (1982). The trial court relied on this principle in disregarding the alleged recantations in Davis's case. Davis argues that the sheer number of recantations in his case demands a different analysis. Pretermitting whether such an argument might ever be persuasive, we find it unpersuasive in Davis's case in light of the analysis that follows. Thus, under the right for any reason principle, we conclude that Davis has failed to show that these alleged recantations support his extraordinary motion for new trial.

At trial, Jeffrey Sapp testified that he was an acquaintance of Davis and knew him by the nickname, "Rough as Hell." Sapp further testified at trial that Davis admitted that he struck Larry Young, shot Mark MacPhail, and then "finished the job." In an affidavit dated 1996, Sapp stated that he had lied to officers about Davis's admission because he wanted the officers to stop "harassing" him and that he later felt pressured by authorities to maintain his story at trial. Kevin McQueen also testified at trial that Davis confessed his guilt to him. McQueen testified that Davis, while in jail, admitted to shooting MacPhail and then shooting him again to ensure his death because MacPhail had seen his face. McQueen stated in an affidavit dated 1996 that he lied at trial because he was angry at Davis. We note that, even if the recantations by Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was not guilty. Furthermore, the witnesses' original testimony against Davis would remain admissible against him in any retrial. These affidavits lack the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (punctuation and citation omitted). See Timberlake, 246 Ga. at 491 (1). Furthermore, we note that these affidavits were both obtained in 1996, long before Davis initiated his federal habeas corpus proceedings. Thus, it appears that Davis has not been diligent in presenting these

affidavits to the trial court, which is another of the requirements in an extraordinary motion for new trial. Id. See Llewellyn v. State, 252 Ga. 426, 428-429 (2) (314 SE2d 227) (1984) (holding that a post-trial delay in obtaining and presenting allegedly-exculpatory evidence shows a lack of required diligence).

Larry Young gave testimony at trial that tended to identify Davis as the one who struck him. His testimony addressed, in part, the clothing persons involved were wearing and the location they were standing during the argument and when Young was struck. In an affidavit dated 2002, Young stated that he was, in fact, unable to "remember what anyone looked like or what different people were wearing" and that he "just couldn't tell who did what." This new expression of uncertainty fails to show that Davis was not in fact the perpetrator and fails to show that the witness's testimony was the "purest fabrication"; therefore it lacks the materiality necessary to support an extraordinary motion for new trial. Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

Darrell Collins, the sixteen-year-old boy who followed Davis as he approached Larry Young, testified at trial that he witnessed Davis striking Young. This testimony was important because other witnesses testified that the person who struck Young also shot MacPhail. Collins stated in an affidavit dated 2002 that he did not witness Young's being struck. Collins also stated that he felt pressured to testify as he did. This testimony does not in any way show that Davis was not guilty of striking Young and shooting MacPhail, and Collins's original trial testimony would still be admissible against Davis in any retrial. Collins's affidavit lacks the type of materiality required to support an extraordinary motion for new trial, as it does not show Collins's trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

Antoine Williams testified at trial that he was "sixty percent" certain that Davis was the shooter. His testimony also included a description of the location of the person who struck Larry Young that was consistent with Davis's location. In an affidavit dated 2002, he stated that he could not identify the shooter. Because there is nothing in this affidavit testimony that indicates affirmatively that Davis was not guilty, and because Williams's original testimony would be admissible against Davis at any retrial, the affidavit testimony lacks the type of materiality required to support an extraordinary motion for new trial, as it does not show Williams's trial testimony to have been the "purest fabrication." Id..

Dorothy Ferrell identified Davis at trial as the shooter. In an affidavit dated 2000, she states that she felt pressured to make the identification and that she did not actually see who shot MacPhail. Again, however, her new version of events lacks the required materiality, because her original trial testimony would be admissible against Davis at any retrial and because her new affidavit testimony does not show her trial testimony to have been the "purest fabrication." Id.

Harriet Murray identified Davis at trial as the shooter, describing in detail his physical features on the night of the murder and his gun. She was cross-examined about inconsistencies between her trial testimony and statements she made to investigators and in Davis's preliminary hearing; however, she never backed down from her identification of Davis. Davis submitted an un-notarized statement from Murray dated 2002 in support of his extraordinary motion for new trial in which she seems to identify Coles as the shooter. Davis also submitted an affidavit dated 2002 from an attorney stating that, when she signed her statement, Murray refused to wait for a notary to arrive or to allow a notary to come to her house later. As we noted above, an extraordinary motion for new trial must include the "affidavit of the witness himself" or an adequate explanation for its absence. Timberlake, 246

Ga. at 491 (1). We find that the five-year-old affidavit presented by Davis as an explanation for the absence of Murray's sworn testimony is inadequate, and, accordingly, we disregard her unsworn statement. Furthermore, even if we were to consider this unsworn statement, we find that yet another inconsistent statement from Murray, made years after the murder, would lack the materiality required to support Davis's extraordinary motion for new trial because it does not show her trial testimony to have been the "purest fabrication." Norwood, 273 Ga. at 353 (2) (citation and punctuation omitted). See Timberlake, 246 Ga. at 491 (1).

B. Statements Recounting Alleged Admissions of Guilt by Coles

We have held as follows:

> It is the long-standing rule in this state that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial . . . or to procure a new trial on the basis of newly discovered evidence.

Timberlake, 246 Ga. at 492 (1). This rule rests at least in part on the concept that a trial court should consider only evidence that would be admissible if a new trial were ordered. See Herrin v. State, 230 Ga. 476, 478-479 (2) (197 SE2d 734) (1973). See also OCGA § 5-5-23 (mandating that newly-discovered evidence presented in a motion for new trial must not be merely impeaching). However, we have held that testimony recounting admissions of guilt by a declarant to a third party are admissible at trial when "the declarant is present, testifies, and is subject to cross-examination." Guess v. State, 262 Ga. 487, 488-489 (2) (422 SE2d 178) (1992). As we have noted already, Coles testified at Davis's trial, so

any alleged admission of guilt by him to a third party would have been admissible at Davis's original trial. Such testimony at trial would be substantive evidence and not merely impeaching of the declarant. Gibbons v. State, 248 Ga. 858, 862 (286 SE2d 717) (1982). But our rule against allowing testimony about such alleged admissions to third persons also rests on the separate rationale that "a person could subvert the ends of justice by [falsely] admitting the crime to others and then absenting himself." Timberlake, 246 Ga. at 492 (1). This concern would exist in the context of an extraordinary motion for new trial even where the declarant has previously testified at trial. We need not decide here, however, whether the rule against such testimony in support of an extraordinary motion for new trial should apply even where the declarant has testified at trial, because the affidavits in question are not sufficiently material to support an extraordinary motion for new trial. Id. at 491 (1).

Davis's extraordinary motion for new trial included an affidavit from Anthony Hargrove dated 2001. Anthony Hargrove stated that he is the brother of Gary Hargrove, whose affidavit is discussed below. Anthony Hargrove further stated that he and Sylvester Coles were smoking marijuana at a party about a year after Officer MacPhail's murder and that Coles stated that "he killed a policeman and a guy named Troy took the fall for it." Davis also presented an affidavit from Shirley Riley dated 2001 in which she stated that, while she and Coles were drinking beside a pool one day, she asked Coles what happened to the officer and he stated that he shot the officer but that it was an accident. Tellingly, however, she added the following: "Maybe Sylvester was just trying to impress me. I don't know for sure who actually shot the officer." Finally, Davis presented an affidavit from Darold Taylor dated 2001. Taylor stated that Coles frequently threatened people and boasted about his violent nature. He also stated that, one day when he and Coles were drinking beers together, he asked Coles about rumors that Coles was the shooter. Taylor stated that, after

first telling him to "stay out of his business," Coles indicated that he was the one who shot the officer. These three affidavits must be considered, if at all, in light of the evidence presented at trial, including Coles's own testimony. Even the statements about the alleged admissions themselves contain evidence that they are not trustworthy, as the statements show that Coles was someone who wanted to be feared and that at least one of the persons to whom he made his admissions doubted his account. Although the jury clearly would not have deemed these statements utterly irrelevant, the affidavits, if considered at trial, would have merely forced the jury to weigh Davis's guilt or innocence in ways that were independent of the trustworthiness of Davis and Coles, who both actually testified at trial and proclaimed their innocence. Thus, pretermitting the categorical analysis applied by the trial court and applying the right for any reason principle, we conclude that these affidavits are not sufficiently material to support Davis's extraordinary motion for new trial. Id.

C. Statements that Coles Disposed of a Handgun Following the Murder

Davis presented affidavits from Tonya Johnson and Anita Saddler stating that they observed Coles in possession of a handgun shortly after the murder. The trial court did not abuse its discretion in finding that these affidavits did not support Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2). First, as the trial court found, Davis has failed to show that he exercised due diligence in obtaining and presenting this testimony earlier. Timberlake, 246 Ga. at 491 (1). Tonya Johnson was a witness at trial, so she was clearly available to Davis. Anita Saddler's affidavit testimony reveals that she could have been identified through Tonya Johnson, showing that she also was available to Davis at trial. Furthermore, as with other affidavits discussed above, Tonya Johnson's affidavit was obtained in 1996, and Davis has failed to show any reason for his failure to exercise due diligence in coming forward with this new evidence in

the trial court sooner, at least before his federal habeas proceedings began. See Llewellyn, 252 Ga. at 428-429 (2). Finally, the affidavits are not so material that they can support Davis's extraordinary motion for new trial. Timberlake, 246 Ga. at 491 (1). Although Coles testified that he disposed of his handgun before the murders, his and other testimony made clear that he had possessed a handgun earlier on the night of the murders. Davis's new testimony, even if not disregarded for other reasons, is not so material to that core question that it can support his extraordinary motion for new trial. Id.

D. Alleged Eyewitness Accounts

Daniel Kinsman was one of a number of members of the military waiting at the Burger King drive-through in a van during the murder. In an un-notarized statement dated 2002, Kinsman stated that he was "confident that [he] would not have been able to make any identification of the shooter due to poor lighting and the chaotic nature of the scene" and that the incident was "over as soon as it began." Nevertheless, Kinsman stated that he had no doubt that the shooter used his left hand and that, "while [he] could not make out the color of the gun, it had a shiny finish which was reflected from the muzzle flash." Kinsman's unsworn statement is followed by an affidavit from an attorney, also dated 2002, explaining that the attorney was "unsuccessful" in his repeated attempts to obtain a notary for Kinsman's statement. As with the unsworn statement of Harriet Murray, this five-year-old explanation for the absence of sworn testimony is inadequate. See Timberlake, 246 Ga. at 491 (1) (requiring the "affidavit of the witness himself" or an adequate explanation for its absence). Furthermore, as the trial court noted, Davis has failed to show that he exercised due diligence in obtaining this new testimony, which was obtained from a witness who was readily identifiable even pre-trial. Id. Finally, Davis's argument about the contents of this unsworn statement is questionable. Several witnesses testified at trial that the murder weapon was dark in color, not chrome like Coles's

handgun. While Kinsman stated in his affidavit that the finish of the handgun was "shiny," as many surfaces of various colors are, in the same affidavit he affirmatively disclaimed his ability to state what color the finish was. Thus, Kinsman's affidavit sheds little light on whether Coles's or Davis's handgun was the murder weapon. Furthermore, even if we were to accept that the shooter fired with his left hand, Davis has not attempted to show which is his dominant hand or which is Coles's dominant hand. Such details might seem trivial, but one who seeks to overturn his conviction for murder many years later bears a heavy burden to bring forward convincing and detailed proof of his innocence. Thus, the trial court understandably found that this testimony was not sufficiently material. Id. For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion by concluding that Kinsman's affidavit did not support Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2).

Gary Hargrove, apparently the brother of affiant Anthony Hargrove, stated in an affidavit dated 2001 that he was an eyewitness to the murder but that he never came forward, because he was on parole and was out past his curfew. However, upon our careful review of this affidavit, we find no abuse of discretion in the trial court's finding that this affidavit lacks sufficient materiality to support Davis's extraordinary motion for new trial. Id.; Timberlake, 246 Ga. at 491 (1). In fact, the affidavit might actually be read so as to confirm trial testimony that Davis was the shooter. Witnesses at trial indicated that one man struck Larry Young, continued to run when ordered to stop by Officer MacPhail, and then shot MacPhail. In his affidavit, Gary Hargrove indicated that Coles was the one who stood still during the murder and that Davis was the one who kept running. The true import of the witness's testimony appears to be that Davis was the one who ran from the officer. Furthermore, Davis bears a heavy burden to come forward with clear evidence of his innocence, not a craftily-worded and vague

account that can be represented as stating one thing when it might very well state the opposite. Thus, we find no abuse of discretion in the trial court's finding that the affidavit "falls short of the . . . assertion that Mr. Hargrove observed Mr. Coles murder Officer MacPhail" and the trial court's finding that the affidavit lacks sufficient materiality. Id.

4. Particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death. In that spirit, we have chosen to focus primarily on one of the required showings for an extraordinary motion for new trial, the requirement that the new evidence be "so material that it would probably produce a different verdict." Timberlake, 246 Ga. at 491 (1). In weighing this new evidence, we do not ignore the testimony presented at trial, and, in fact, we favor that original testimony over the new. At least one original witness has never recanted his in-court identification of Davis as the shooter, which included a description of his clothing and the location he was in when he struck Larry Young. As we have noted above, most of the witnesses to the crime who have allegedly recanted have merely stated that they now do not feel able to identify the shooter. At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both Davis and Coles claiming the other was guilty. We simply cannot disregard the jury's verdict in this case. For that reason, along with the other reasons set forth above, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial. Young, 269 Ga. at 491-492 (2).

5. Davis argues that the trial court should not have denied his extraordinary motion for new trial without first holding a hearing. We have held as follows:

> if the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion.

Dick, 248 Ga. at 899 (2) (emphasis in original). This requirement mandates that a defendant provide sworn affidavit testimony, or an explanation for the absence of such affidavit testimony, showing with clarity and specificity the facts he or she intends to prove in a hearing and how those proffered facts support his or her claim that a new trial is warranted. Upon our careful review of Davis's extraordinary motion for new trial and the trial record, we find that Davis failed to present such facts in his motion and, therefore, that the trial court did not abuse its discretion in denying that motion without a hearing.

6. Davis argued in the trial court that to apply Georgia's procedures for extraordinary motions for new trial in a manner that allows for his execution would be unconstitutional. See Herrera v. Collins, 506 U. S. 390 (113 SC 853, 122 LE2d 203) (1993). We hold that Georgia law, as described and applied above, is not unconstitutional.

Judgment affirmed. All the Justices concur, except Sears, C.J., Hunstein, P.J., and Benham, J., who dissent.

S07A1758. DAVIS v. THE STATE.

SEARS, Chief Justice, dissenting.

As the majority notes, Georgia law is largely silent regarding the standards that should govern extraordinary

motions for new trial. Thus, by necessity, "the procedural requirements for such motions are the product of case law."[1] This Court has attempted to set standards that promote respect for the judicial process and confidence in the outcomes of that process. Thus, we have required that defendants exercise diligence in discovering and bringing their claims, and we have set the threshold very high for showing that new evidence should take precedence over the evidence presented at trial.[2] However, I believe that this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death.

We have noted that recantations by trial witnesses are inherently suspect, because there is almost always more reason to credit trial testimony over later recantations. However, it is unwise and unnecessary to make a categorical rule that recantations may never be considered in support of an extraordinary motion for new trial. The majority cites case law stating that recantations may be considered only if the recanting witness's trial testimony is shown to be the "purest fabrication."[3] To the extent that this phrase cautions that trial testimony should not be lightly disregarded, it has obvious merit. However, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. If recantation testimony, either alone or supported by

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[1] Dick v. State, 248 Ga. 898, 899 (2) (287 SE2d 11) (1982).

[2] Timberlake v. State, 246 Ga. 488, 491 (1) (271 SE2d 792) (1980).

[3] Norwood v. State, 273 Ga. 352, 353 (2) (541 SE2d 373) (2001) (quoting Johnson v. State, 236 Ga. App. 764, 765 (1) (513 SE2d 291) (1999))

other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.

The majority opinion also notes concerns about confessions by persons other than the defendant. In particular, the majority states that a witness might falsely confess and then flee prosecution. However, this concern could be addressed by requiring the witness to appear in the trial court before his or her alleged confession may be considered. Thus, the trial court would have benefit of the same testimony and cross-examination that a jury would have if a new trial were ordered.

The majority opinion wisely states the following:

> [W]e have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death.

Maj. Op., p. 19. I would go further. Because this Court is entrusted with establishing the procedures and standards governing extraordinary motions for new trial, I would hold that recantations and confessions to third parties are not categorically excluded.[4] Instead, they should be assessed by

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[4] The effect of the majority's ruling that the witnesses' recantations "lack the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the 'purest fabrication,'" Maj. Op., p. 8-9, is to categorically exclude recantations except in those exceedingly-rare instances when the fabrication is proven by extrinsic evidence, see Fugitt v. State, 251 Ga. 451 (1) (307 SE2d 471) (1983). Also, the majority merely pretermits the question of whether confessions by another to third parties should be admissible, rather than explicitly holding that they are admissible.

the trial court within its sound discretion.[5] This Court was right to hold that such testimony is inherently suspect, and the Court was right to hold that a trial court should consider only such evidence as would be admissible if a new trial were ordered. However, this Court is free to adopt rules and standards that best promote the ends of justice, and this case illustrates with alarming clarity why this Court's rules should allow trial courts to consider all forms of evidence that would be admissible if a new trial were ordered and to exercise sound discretion in weighing that evidence.

While the majority wisely decides to look beyond bare legal principles and seeks to consider the strength of Davis's new evidence, I believe that it has weighed that evidence too lightly. In this case, nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably. Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter. Perhaps these witnesses' testimony would prove incredible if a hearing were held. Perhaps the majority is correct that the alleged eyewitness's testimony will actually show Davis's guilt rather than his innocence. But the collective effect of all of Davis's new testimony, if it were to be found credible by the trial court in a hearing,[6] would show

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[5] Young v. State, 269 Ga. 490, 491-492 (2) (500 SE2d 583) (1998).

[6] The issues raised by the majority regarding Davis's diligence in bringing his new evidence before the trial court and regarding the fact that several of the affidavits are not notarized also seem well suited to being addressed by the trial court in a hearing under the facts of this case. Furthermore, even if the affidavits affected by these issues were discounted, I still believe a hearing on the remaining new evidence would be warranted.

the probability that a new jury would find reasonable doubt of Davis's guilt or at least sufficient residual doubt to decline to impose the death penalty. Accordingly, I would order the trial court to conduct a hearing, to weigh the credibility of Davis's new evidence, and to exercise its discretion in determining if the new evidence would create the probability of a different outcome if a new trial were held. I am authorized to state that Presiding Justice Hunstein and Justice Benham join in this dissent.

APPENDIX B -- ORDER DENYING EXTRAORDINARY MOTION FOR NEW TRIAL AND MOTION FOR STAY OF EXECUTION BY THE SUPERIOR COURT OF CHATHAM COUNTY DATED JULY 13, 2007

IN THE SUPERIOR COURT OF CHATHAM COUNTY

STATE OF GEORGIA

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CHATHAM COUNTY, GA

STATE OF GEORGIA,

vs. Criminal No. CR89-2467-FR

TROY ANTHONY DAVIS,

Defendant.

ORDER ON DEFENDANT'S EXTRAORDINARY MOTION FOR NEW TRIAL and MOTION FOR STAY OF EXECUTION

Before the Court are Defendant's Extraordinary Motion for New Trial Pursuant to O.C.G.A. § 5-5-41(c)[1] ("Extraordinary Motion for New Trial") and Motion for Stay of Execution. The Court, recognizing the attendant gravity of

[1] The Court notes that while Defendant cites O.C.G.A. § 5-5-41(c) as authority for this Extraordinary Motion for New Trial, it appears to the Court that Defendant actually brings such motion pursuant to O.C.G.A. § 5-5-41(b) as Defendant fails to argue such statutory authority in his Brief and, further, fails to comply with the requirements of O.C.G.A. § 5-5-41(c) et sq. to bring such Motion.

these motions, and having thoroughly and carefully read and considered these two Motions and further related pleadings, the State's responses thereto, the entire record and the applicable law, hereby finds as follows:

Extraordinary Motion for New Trial

Defendant moves this Court to convene a hearing on Defendant's Extraordinary Motion for New Trial. In his brief, Defendant argues that "newly discovered evidence" requires that a new trial be granted. Although O.C.G.A. § 5-5-41(b) authorizes Defendant to make such a Motion, the Court recognizes that in general, the Georgia Courts do not favor extraordinary motions for new trial. Dick v. State, 248 Ga. 898, 899 (1982) ("Extraordinary motions for a new trial are not favored, and a stricter rule is applied to an extraordinary motion based on the ground of newly available evidence than to an ordinary motion on that ground.") (cit. omitted). Defendant bears a heavy burden in bringing such a motion. Specifically:

> It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Drake v. State, 248 Ga. 891, 894 (1982)(cit. omitted). To meet his burden, Defendant's pleadings and accompanying

affidavits must set forth "facts satisfying these requirements; conclusions of counsel will not suffice." Dick, 248 Ga. At 900. "Failure to show one requirement is sufficient to deny a motion for new trial." Timberlake v. State, 246 Ga. 488, 491 (1980)(cit. omitted). Moreover, an extraordinary motion for new trial that fails to show "any merit" may be denied a requested hearing. Dick, 248 Ga. At 899.

Defendant argues in his brief that newly discovered evidence warrants a new trial.[2] Specifically, Defendant submits to the Court affidavits that fall generally into the following categories: (1) evidence characterized by the Defendant as recantations of trial testimony[3]; (2) evidence averring post-trial confessions by Mr. Sylvester Coles[4]; (3) affidavits of persons who have not previously testified who were either present at the scene of the murder of Officer

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[2] This Court notes that while Defendant's Extraordinary Motion for New Trial does not exceed statutory authority for timely filing, the majority of affidavits submitted by Defendant were sworn over five years ago and a few affidavits were sworn over ten years ago. The Georgia Supreme Court has looked askance at evidence that was obtained four years post-trial and then was not submitted to the Court for two additional years, at which point it formed the basis of an extraordinary motion for new trial. "The statutes which control extraordinary motions for new trial based on newly discovered evidence require a defendant to act without delay in bringing such motion. The obvious reason for this requirement is that litigation must come to an end." Llewellyn v. State, 252 Ga. 426, 428 (1984).

[3] In his brief Defendant argues that the following individuals have now recanted or materially recharacterized their previous testimony: Larry Young; Harriet Murray; Dorothy Ferrell; Antoine Williams; Darrel "D.D." Collins; Kevin McQueen; and Jeffrey Sapp.

[4] Defendant submits affidavits from Anthony Hargrove, Shirley Riley and Darold Taylor wherein each affiant states that Mr. Coles has implicated himself in the murder of Officer MacPhail.

MacPhail or in the general area in the moments following the crime; (4) expert affidavits; (5) affidavits of jurors; and (6) a general cache of affidavits that do not fall into the above-enumerated categories. The court has exhaustively reviewed each submitted affidavit and considered in great detail the relevant trial testimony, if any, corresponding to each.

The Court finds that the first category of evidence submitted by Defendant fails to meet the newly discovered evidence standard under well-settled Georgia law. "A post-trial declaration by a State witness that his former testimony was false is not cause for a new trial." Pryor v. State, 179 Ga. App. 293, 294 (1986)(cit. omitted); Brown v. State, 209 Ga. App. 314, 316 (1993); Drake v. State, 248 Ga. 891, 894 (1982).

The second category of evidence submitted by Defendant contains affidavits wherein the affiants allege that Mr. Coles confessed the murder to them. Accordingly, these three affidavits contain inadmissible hearsay. "It is the long-standing rule in this state that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial." Timberlake, 246 Ga. at 492. Accordingly, these three affidavits fail to meet the threshold or "overriding" requirement of the six-part standard that the newly discovered evidence be admissible. Dick, 248 Ga. at 900.

The third category of evidence submitted by Defendant contains affidavits by persons who have not previously given testimony in this case, wherein the affiants were either present at the scene of the crime or in the general vicinity thereof. Each of these affidavits fails to meet the six-part standard.

The first such affidavit, of Gary Hargrove, dated August 17, 2001, states that he observed whom he believed to

be Mr. Davis running from the scene of the crime. The affidavit further states that a person Mr. Hargrove establishes as Mr. Sylvester Coles was facing the body of Officer MacPhail. The Court first notes that this affidavit falls short of the brief's plain assertion that Mr. Hargrove observed Mr. Coles murder Officer MacPhail, and such assertion is clearly discouraged. Dick, 248 Ga. at 899 (holding that Defendant must meet his burden through pleadings and affidavits that set forth "facts satisfying these requirements; *conclusions of counsel will not suffice*")(emphasis added). Moreover, the Court finds such evidence to be cumulative to that heard at trial. Defendant concedes as much in his brief.[5] Accordingly, the Court finds that Defendant does not establish to this Court that the affidavit of Mr. Gary Hargrove meets elements two, three and four of the six-part standard, described, supra.

The Court likewise finds that Defendant fails to meet his burden regarding the affidavits of Anita Saddler and Daniel Kinsman and therefore such affidavits do not qualify as newly discovered evidence. The affidavit of Ms. Sadler, July 10, 2002, states that she observed Mr. Coles with a gun in his possession minutes after the murder occurred and also that he acted nervously. This affidavit provides cumulative evidence and serves to impeach Mr. Coles, who testified at trial that he was in possession of a gun the evening of the murder but that he had discarded said weapon prior to the occurrence of the crime. As such, Ms. Sadler's affidavit fails to meet elements two, three, four and six of the six-part standard.

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[5] "[H]argrove's affidavit corroborates trial witness Joseph Washington's affidavit and trial testimony that identified Red Coles as the assailant who shot and killed Officer MacPhail." Defendant's Brief at 11.

Defendant next presents the unsworn affidavit of Daniel Kinsman, allegedly signed in October 2002, who states that the perpetrator shot with his left hand and that the murder weapon had a shiny finish. The Court finds, however, that Defendant fails to meet his burden to establish elements to and three, and therefore Kinsman's affidavit similarly fails to meet the requisite six-part standard.

The fourth category of evidence submitted by Defendant consists of two affidavits purporting to present expert testimony. One such affidavit, from Jeffrey Neuschatz, dated July 6, 2007, argues generally that practice standards on witness identification have changed since the 1991 trial. The second affidavit, from Kelly Fite, dated April 18, 2003, discusses ballistics evidence and is apparently submitted to impeach the expert testimony elicited by the State at trial. The Court finds that both affidavits fail to meet elements two, four and six of the six-part standard.

The fifth category of evidence submitted by Defendant includes affidavits from jurors who, after reviewing selected affidavits, now express concerns about the case. The Court finds that the jurors' affidavits do not form a legal basis of support for Defendant's Extraordinary Motion for New Trial. "The Georgia Code reflects the venerable common law rule prohibiting jurors from impeaching their verdict." Gaines v. State, 274 Ga. App. 575, 576 (noting that O.C.G.A. § 17-9-41 provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict").

The sixth category of evidence submitted by Defendant contains all remaining affidavits. The Court finds that Defendant fails to meet his burden for all such affidavits wherein he fails to satisfy this Court that each such affidavit meets the six-part standard.

Wherefore, in light of the foregoing, and the Court having found that Defendant has failed to carry his burden on

each and every submitted affidavit, the Court hereby **DENIES** Defendant's request for a hearing and **DENIES** Defendant's Extraordinary Motion for New Trial.

Motion for Stay of Execution

Defendant moves this Court to stay his execution pending this Courts' determination of Defendant's Extraordinary Motion for New Trial. The Court, having denied Defendant's Extraordinary Motion for New Trial, accordingly **DENIES** Defendant's Motion for Stay of Execution.

SO ORDERED THIS 13TH DAY OF JULY, 2007.

S/PENNY HAAS FREESEMANN, JUDGE
SUPERIOR COURT, E.J.C.
STATE OF GEORGIA

cc: Thomas Dunn, Esq.
Spencer Lawton, DA
David Lock, ADA

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(2)

No. 08-66

FILED
AUG 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

1.

Whether the Georgia Supreme Court's fact-specific application of long-standing state law requirements governing extraordinary motions for new trial, presents no issue warranting this Court's exercise of its certiorari jurisdiction?

2.

Whether the record demonstrates that this case is not the proper vehicle for reviewing Petitioner's Eighth Amendment "innocence" claim which has been repeatedly litigated in state and federal habeas proceedings?

3.

Whether Petitioner's unfounded and newly-crafted assertion that Petitioner has a "liberty interest" in obtaining a hearing in a state court extraordinary motion for new trial proceeding was not raised in the lower courts, did not serve as the basis for the Georgia Supreme Court's decision and does not warrant the grant of certiorari in the context of the specific facts of Petitioner's case?

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DENIAL OF SPECIFIC "FACTS" SET OUT IN PETITION

Respondent denies Petitioner's factual assertion that he is "an innocent man," (Petition, p. 7), as well as Petitioner's assertion that he has presented "substantial new admissible evidence of innocence." (Petition, p. 3).

The evidence in the record does not support Petitioner's factual assertion that the Supreme Court of Georgia "barred relevant recantation evidence," (Petition, p. 24), nor does the record support Petitioner's assertion that the trial court and the Georgia Supreme Court "exacerbated the risk of an erroneous execution." (Petition, p. 24). Respondent denies Petitioner's assertion that the State's case was "made up almost entirely of this type of questionable evidence." (Petition, p. 29).

Respondent also disputes Petitioner's characterization of various newly-obtained post-trial declarations as constituting "recantations of eyewitness testimony," since the Georgia Supreme Court correctly noted with reference to several of these post-trial declarations that the statement "fails to show that Davis was not in fact the perpetrator and fails to show that the witness's testimony was the 'purest fabrication.'" *Davis v. State*, 283 Ga. 438, 442 (2008).

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

(a) Trial Proceedings in the Superior Court of Chatham County (1989-1991)

Petitioner, Troy Anthony Davis, was indicted in Chatham County, Georgia on November 15, 1989, for the murder of Officer Mark Allen MacPhail, obstruction (against Officer Mark Allen MacPhail), two counts of aggravated assault and possession of a firearm during the commission of a felony.

During Petitioner's trial, held on August 19-30, 1991, Petitioner was represented by Robert Falligant and Robert Barker. During his opening statement, defense counsel Barker argued, "You're going to hear a story that is going to be unbelievable. You are going to see a cast of characters that you will never have seen before, and they are unbelievable, and I mean that in two senses. They are just not worthy of belief." (T. 682.)[1]

Petitioner testified in his own behalf at trial.[2] Petitioner admitted that he was at the scene of the shooting, but claimed he did not see who shot Office

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[1] T. 679-683. (References to the transcript of Petitioner's trial will be designated by T., followed by the appropriate page number.)

[2] T. 1415-1459.

MacPhail because he was running away from the shooting and never looked back to see who did the shooting. (T. 1424; 1435). Petitioner specifically testified, "I heard the shot, but I didn't exactly see the shooting." (T. 1435).

During the trial, jailhouse informant Kevin McQueen testified that Petitioner admitted to him that he shot Officer MacPhail. (T. 1232). Petitioner testified that he did not know McQueen, never made a statement to McQueen and was never in the same cell with McQueen (T. 1459), and did not play basketball with McQueen. (T. 1431-1434). Petitioner Davis specifically denied ever telling McQueen that he killed the cop. (T. 1434).

Petitioner also testified that he did not shoot Michael Cooper at the party in Cloverdale, occurring the day before Officer MacPhail's murder. In fact, Petitioner claimed that he did not know Michael Cooper and saw him for the first time in the courtroom. (T. 1435).

Defense counsel for Petitioner presented the following five witnesses during the guilt-innocence phase of Petitioner's trial: Joseph Washington (T. 1339); Shelley Sams (T. 1352); Tonya P. Johnson (T. 1357); Jeffrey Sams (T. 1372-1373); and Virginia Roberts Davis (T. 1385).

During his trial, just as during his extraordinary motion for new trial, Petitioner claimed that Sylvester "Red" Coles was the murderer of Officer MacPhail. However, Red Coles also testified during

Petitioner's trial and was extensively cross-examined by defense counsel.[3] (T. 899-974). During his trial testimony, Red Coles did not implicate Petitioner in the shooting of Officer MacPhail, but merely stated that he and Petitioner were together when the shooting occurred. (T. 938-942). Red Coles testified that he never saw Petitioner fire any shot that night and that he did not know who shot Officer MacPhail. (T. 942).

During defense counsel's guilt phase closing argument,[4] counsel attempted to discredit the eyewitness testimony identifying Petitioner as the shooter, by arguing the following:

> The first evidence and information they ever had in this case came from the mouth of the witness that the State put on the stand, and that was Sylvester Red Coles, the same individual who admitted having a gun, the same individual that numerous witnesses identified as having a gun that night, the same individual who admitted that he ran, he changed shirts, tried to conceal his identity, the same individual who admitted he ran to a lawyer and turned himself in at four o'clock, but not to surrender for a crime, but to give the police the name of the person that they should be looking for.

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[3] The cross-examination of Red Coles appears on pages 919-951 of the guilt phase transcript.

[4] Defense counsel's closing argument appears on pages 1506-1550 of the trial transcript.

And he gave them the name of Troy Anthony Davis, and from that point on, the entire focus of this investigation was not in deciding and finding the truth of this case as to who actually committed these crimes that the Defendant is now on trial for, but it was to find evidence to convict the Defendant of these crimes.

You see, at that point, the police knew, after talking to Sylvester Coles, that he, D.D. Collins, and the Defendant were on the lot that night. And yet what did the police do? They bought Mr. Coles' story hook, line, and sinker. They never considered Mr. Coles to be a suspect. They never considered Mr. Collins to be a suspect. What they considered them to be was witnesses.

They never questioned for one minutes (sic) the truth of what Sylvester Coles had to tell them. And then began this investigation. And they went out into this community, and they rounded up witnesses everywhere they could find them, and they paraded them in here, and Mr. Lawton talks about the overwhelming evidence in this case. We were overwhelmed by the number of witnesses in this case. **But what about the quality, the credibility of those witnesses?**

You, the jurors in this case are the sole judges of the credibility of those witnesses. . . . Seven witnesses put on that stand by the State of Georgia recanted, contradicted, or changed their testimony. . . .

> Many of those witnesses who came into this courtroom and changed their testimony and said, the first thing out of their mouth was, I'm not going to lie now.

(T. 1507-1509) (emphasis supplied).

Defense counsel also argued that there were "striking similarities in facial features" between Petitioner and Red Coles. (T. 1511). Later, defense counsel specifically argued that Red Coles, not Petitioner, had the motive, means and opportunity to commit the murder. (T. 1518-1519).

As to the jailhouse informant, Kevin McQueen, defense counsel argued, "Look at his record and see if you can attach any credibility to the story that he told" and "let's look at the story he told." (T. 1535-1536). Defense counsel again challenged McQueen's credibility by arguing, "I don't know why they even put a man like Kevin McQueen on the stand. The outrageous story that he concocted doesn't even begin to mesh, or it's not even similar to the incidents that occurred that night." (T. 1537).

Finally, defense counsel argued, "This case is replete with reasonable doubt, and I submit to you that in your quest for the truth, what this case is all about, as you sift through this evidence and you review your notes about the consistencies, the prior inconsistent statements, the outright lies, the fabrications of the State's witnesses, if you reach the conclusion that the State has not carried its burden beyond a reasonable doubt, then as the Court will charge

you, you'll be bound to acquit the Defendant." (T. 1549-1550).

On August 28, 1991, Petitioner was found guilty of one count of malice murder, one count of obstruction of a law enforcement officer, two counts of aggravated assault and one count of possession of firearm during the commission of a felony.

Petitioner Davis also testified during the sentencing phase of his trial (Sentencing phase transcript, pp. 52-67), asking the jury to spare his life, by continuing to assert his "innocence" by telling the jury that "at the present time you've found me guilty of some offenses that I did not even commit." (T. 65).

Defense counsel continued to argue lingering doubt as to Petitioner's guilt during his sentencing phase closing argument. (Sentencing phase transcript, p. 80). Following the penalty phase, Petitioner was sentenced to death for the murder of Officer MacPhail on August 30, 1991.

(b) Motion for New Trial Proceedings in the Trial Court (1991-1992)

On September 12, 1991, the trial court appointed Petitioner's trial attorneys to represent Petitioner on appeal and appointed another attorney, Mr. C. Jackson Burch, to represent Petitioner specifically as to raising any claims of ineffective assistance of counsel.

On October 1, 1991, Petitioner's original trial attorneys, Falligant and Barker, filed a motion for

new trial on Petitioner's behalf, raising three grounds.[5] On February 14, 1992, Mr. Falligant and Mr. Barker filed an amended motion for new trial, raising 26 grounds, all alleging trial court error.[6] The hearing on this motion was held on February 18, 1992.

Immediately following this hearing, Mr. Burch filed an "Amendment to Motion for New Trial as to Ineffective Assistance of Trial Counsel," raising 16 different grounds of ineffective assistance of trial counsel.[7] On February 28, 1992, the trial attorneys added an additional ground to their amended motion for new trial. On March 16, 1992, the trial court denied all portions of the motion for new trial, as amended.

(c) Consolidated Direct Appeal to the Georgia Supreme Court (1992-1993)

On appeal, the Georgia Supreme Court consolidated Petitioner's two appeals before the Court. *See*

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[5] In his original motion for new trial, Petitioner alleged the following:

> (1) verdict is contrary to the evidence without evidence to support it;
>
> (2) verdict is decidedly and strongly against the weight of the evidence; and
>
> (3) verdict is contrary to law under the principals of justice and equity. (Record on Direct Appeal, 2729).

[6] Record on Direct Appeal, 2745-2749.

[7] Record on Direct Appeal, 2752-2782.

Davis v. State, 263 Ga. 5 (1993). Petitioner's convictions and death sentence were unanimously affirmed by the Georgia Supreme Court in the consolidated appeal in *Davis v. State*, 263 Ga. 5 (1993).

In its decision, the Georgia Supreme Court summarized the facts presented at Petitioner's trial as follows:

> At midnight, on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound Bus Station in Savannah, adjacent to a fast food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform – including badge, shoulder patches, gun belt, .38 revolver, and night stick – ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up to the stricken officer and shot him several more times. The officer's gun was still in his holster.
>
> The victim wore a bullet-proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest and penetrated his left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left cheek and the right leg.
>
> The next afternoon, Davis told a friend that he had been involved in an argument at the

> restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
>
> After his arrest, Davis told a cellmate a similar story.

Davis v. State, 263 Ga. 5, 6 (1993).

The Georgia Supreme Court also specifically found that the evidence presented at trial was sufficient to support the verdict under the *Jackson v. Virginia* standard, by holding that, "The evidence supports the conviction on all counts. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)." *Davis v. State*, 263 Ga. 5, 7 (1993).

Petitioner's petition for a writ of certiorari was denied by this Court in *Davis v. Georgia*, 510 U.S. 950 (1993).

(d) State Habeas Corpus Proceedings (1994-1997)

On March 15, 1994, the Georgia Appellate Practice and Educational Resource Center, Inc. filed a habeas corpus petition on behalf of Petitioner. On August 28, 1995, counsel for Petitioner filed a notice of withdrawal of named counsel and motion to continue, which motions were denied on October 19, 1995. Petitioner filed a petition for immediate review

of the order denying continuance in the Georgia Supreme Court. After granting the petition for immediate review, the Court concluded that the habeas corpus court abused its discretion in denying Petitioner a continuance. *Davis v. Thomas*, 266 Ga. 835 (1996).

Petitioner filed a 79-page amendment to his state habeas corpus petition, raising 15 claims for relief, on November 6, 1996. During the state habeas corpus evidentiary hearing held on December 16, 1996, all four of Petitioner's trial attorneys testified and Petitioner presented 33 affidavits. Petitioner did not present any live testimony from the affiants whose affidavits were offered at the state habeas hearing and whose affidavits were also presented during the extraordinary motion for new trial.

During the state habeas corpus hearing, Petitioner's lead trial attorney, Robert Falligant, testified that the real issue at trial was:

> whether or not he [Davis], in fact, was the person who committed the crimes. And, quite frankly, based on the information that we had and the evidence I had, it appeared it was a very good likelihood that Sylvester Coles, also known as Red, was the one who actually killed Officer MacPhail and shot, well not so much shot Michael Cooper, but the main issue in my case was the death of Office MacPhail, and basically that is the emphasis we put on the investigation and what we were looking for.

(State habeas corpus transcript, volume 1, pp. 125-126).

The state habeas corpus court denied Petitioner relief on September 9, 1997. In denying Petitioner relief, the state habeas corpus court found the following:

> from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial. (cite omitted) The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer MacPhail. **This court, although acting now as the finder of fact in this habeas proceeding, cannot supplant the role of the jury and find based on its own review of the record that the jury *should* have concluded that the state did not carry its burden at Davis' trial.** The core purpose of the writ of habeas corpus would not be served by such a presumptuous usurpation of the jury's deliberative process. This court is limited to evaluating whether Davis' rights were properly protected in the context of his jury trial.

(State Habeas Corpus Order of 9/5/97, p. 41) (emphasis supplied).

The state habeas corpus court denied relief by finding that all of Petitioner's claims had been procedurally barred except for his ineffectiveness claim as to the motion for new trial and appellate stages. (State habeas corpus court order denying relief, p. 43).

(e) Appeal to the Georgia Supreme Court from the Denial of State Habeas Corpus Relief (1997-2000)

Petitioner appealed to the Supreme Court of Georgia from the denial of state habeas corpus relief. In Claim VII of his application for a certificate of probable cause to appeal, Petitioner alleged, *inter alia*, that the trial evidence showed that Red Coles was the shooter. (Application, pp. 88-101).

On February 24, 2000, the Georgia Supreme Court granted Petitioner's application for certificate of probable cause to appeal from the denial of state habeas corpus relief and asked the parties to address four specific questions: (1) whether execution by electrocution constituted cruel and unusual punishment under our Federal and State Constitutions; (2) whether imposition of the death penalty in this case was disproportionate to the penalty imposed in other similar cases in Georgia; (3) whether Petitioner's appellate counsel operated under a conflict of interest; and (4) whether Petitioner's absence during critical stages of his trial violated his rights under our Federal and State Constitutions.

The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000, in *Davis v. Turpin*, 273 Ga. 244 (2000), and denied Petitioner's motion for reconsideration on December 15, 2000.

On May 14, 2001, Petitioner filed a petition for a writ of certiorari in this Court which was denied on October 1, 2001 in *Davis v. Turpin*, 534 U.S. 842 (2001).

(f) Federal Habeas Corpus Proceedings (2001-2004)

Petitioner filed his application for federal habeas corpus relief in the United States District Court for the Southern District of Georgia, Savannah Division, on December 14, 2001.

Petitioner's motion for an evidentiary hearing which requested, in part, that Petitioner be allowed to present evidence of alleged recantations of trial witnesses,[8] was denied on March 10, 2003. In denying Petitioner's motion for an evidentiary hearing, the federal habeas corpus court extensively reviewed each affidavit proffered during the state habeas corpus proceedings and where applicable, compared the affiant's testimony to any testimony which was

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[8] *See* Respondent's Appendix 1 to this brief which is Respondent's Chart Listing Exhibits Offered By Petitioner During the Extraordinary Motion for New Trial.

given during Petitioner's trial, as well as determining whether the affiant had previously provided an affidavit. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).[9]

In reviewing Petitioner's evidentiary hearing request, the federal habeas court scrutinized these affidavits, both to determine if they could have been submitted during state habeas corpus proceedings (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 40) and also, to determine if the presentation of these affidavits would undermine the court's confidence in the outcome of the proceeding.[10] (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 40-41).

The federal habeas court expressly stated that it would consider all of the affidavits and material admitted during state habeas corpus proceedings, but would not permit Petitioner to re-offer these affidavits during a federal evidentiary hearing. (Federal

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[9] As the federal habeas court noted, with the exception of attorney testimony, all of the "actual innocence" testimony offered by Petitioner during state habeas corpus proceedings, was in affidavit form. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 39).

[10] In fact, the federal habeas corpus specifically examined each affidavit offered by Petitioner. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).

Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 41).[11]

The federal habeas court reviewed the trial testimony, including Petitioner's testimony, the evidence presented during state habeas corpus proceedings and found that even after Petitioner had been given a full opportunity to present any evidence in support of his "actual innocence" claim he had failed to establish that he was "factually innocent." (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22; 37-41.)

The record is clear that the federal habeas court examined the post-trial affidavits relied upon by Petitioner and the federal habeas court held that, "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." (Federal Habeas Court Order of 5/13/04, denying relief, p. 25).

The federal habeas corpus court denied Petitioner habeas corpus relief on May 13, 2004, and denied Petitioner's motion to amend the judgment on June 3, 2004.

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[11] This is the same decision reached by the trial court in considering these affidavits when proffered as "support" for Petitioner's extraordinary motion for new trial. (*See*, 7/13/07 Order Denying Extraordinary Motion for New Trial, pp. 6-7; Petitioner's Appendix pp. 26a-27a.)

(g) Appeal to the Eleventh Circuit Court of Appeals (2004-2006)

Although the district court denied Petitioner's application for a certificate of appealability, the Eleventh Circuit granted Petitioner's application on September 15, 2004.

The Eleventh Circuit began its examination of Petitioner's appeal from the denial of federal habeas corpus relief by noting that, "in this case, Davis does not make a substantive claim of actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006). The Eleventh Circuit proceeded to find that Petitioner "concedes" that all of his claims for relief are procedurally defaulted and that the federal habeas court actually considered the "merits" of Petitioner's constitutional claims, but nevertheless, "rejected them as a matter of law." *Davis v. Terry*, 465 F.3d 1249, 1252 (11th Cir. 2006).

The Eleventh Circuit ultimately concluded that, "we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally unfair." *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006).

(h) Petition for Certiorari from Eleventh Circuit Decision Affirming Denial of Federal Habeas Relief (2007)

Petitioner's petition for a writ of certiorari was filed on April 11, 2007. The question presented in that petition reads as follows:

No court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent. The Court of Appeals for the Eleventh Circuit affirmed the district court's refusal to examine Petitioner's evidence of innocence. If believed, the post-trial affidavits of numerous witnesses show that constitutional violations led to the conviction of an innocent man. In violation of this Court's precedent, no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims.

The question presented is:

Can a habeas court avoid its role as a fact finder in substantial innocence cases by skipping the innocence 'gateway' inquiry and ruling on a petitioner's constitutional claims when the innocence and constitutional issues arise out of the same facts?

This petition for certiorari was denied on June 25, 2007 in *Davis v. Terry*, 127 S.Ct. 3010 (2007).

(i) Extraordinary Motion for New Trial Proceedings in the Trial Court and Appeal to the Georgia Supreme Court (July 2007)

On July 9, 2007, eight days before his scheduled execution timeframe, Petitioner filed an Extraordinary Motion for New Trial in the Superior Court of Chatham County, Georgia. In his extraordinary motion, Petitioner alleged that "this is a case of mistaken identity"

and that "Red Coles – not Davis – murdered Officer MacPhail." (Extraordinary motion for new trial, pp. 1-2.)

Relying solely on state law (Petitioner's 21a-27a), the trial court denied Petitioner's extraordinary motion without a hearing on July 13, 2007. However, although no evidentiary hearing was conducted, the trial court having recognized "the attendant gravity" of the motion, "thoroughly and carefully" reviewed each of the affidavits offered by Petitioner as alleged support for his motion. (Petitioner's Appendix 21a-22a). In denying this extraordinary motion, the trial court aptly observed that "the majority of affidavits submitted by Defendant were sworn over five years ago and a few affidavits were sworn over ten years ago." (Petitioner's Appendix 23a, footnote 2.)

On July 17, 2007, Petitioner filed a Notice of Appeal from the denial of this extraordinary motion for new trial and an application for discretionary appeal on July 16, 2007 and a motion for stay of execution in the Georgia Supreme Court. In this application, Petitioner did not raise any liberty interest, but merely stated that "the application will specifically address why the lower court's denial of the extraordinary motion for new trial was erroneous." (Application, p. 3). While that application was pending, the Georgia Board of Pardons and Paroles granted a temporary stay of execution and scheduled a clemency hearing.

On August 3, 2007, the Georgia Supreme Court dismissed Petitioner's motion for a stay of execution

as moot and granted Petitioner's application for a discretionary appeal. *Davis v. State*, 282 Ga. 368 (2007). The State Board of Pardons and Paroles rescinded its stay of execution and suspended its clemency consideration, pending the Georgia Supreme Court's consideration of Petitioner's discretionary appeal.

On March 17, 2008, the Georgia Supreme Court concluded that the trial court did not abuse its discretion in denying Petitioner's extraordinary motion for new trial without a hearing. *Davis v. State*, 283 Ga. 438 (2008). The Georgia Supreme Court reviewed the evidence presented at trial and found that, "at trial, Davis's defense centered on the theory that Coles was the murderer. Both Davis and Coles testified, each claiming their innocence. **The evidence at trial authorized the jury to conclude beyond a reasonable doubt that Davis was the man who struck Larry Young and shot Officer MacPhail.**" *Davis v. State*, 283 Ga. 438, 440 (2008) (emphasis supplied).

The Georgia Supreme Court extensively reviewed each category of "affidavit testimony" on which Petitioner's extraordinary motion relied, including "recantations by trial witnesses"; "statements recounting alleged admissions of guilty by Coles"; "statements that Coles disposed of a handgun following the murder" and "alleged eyewitness accounts." *Davis v. State*, 283 Ga. 438, 441-447 (2008).

In reviewing Petitioner's extraordinary motion, in light of the trial evidence, the evidence presented at the extraordinary motion for new trial and controlling state legal principles, the Georgia Supreme Court expressly noted, "particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death." *Davis v. State*, 283 Ga. 438, 447 (2008).

The Georgia Supreme Court held that, "Upon our careful review of Davis's extraordinary motion for new trial and the trial record, we find that Davis failed to present such facts in his motion and, therefore, that the trial court did not abuse its discretion in denying that motion without a hearing." *Davis v. State*, 283 Ga. 438, 448 (2008).

The Georgia Supreme Court held as follows, in rejecting the alleged basis for Petitioner's petition for certiorari: "Davis argued in the trial court that to apply Georgia's procedures for extraordinary motions for new trial in a manner that allows for his execution would be unconstitutional. *See Herrera v. Collins*, 506 U. S. 390 (113 S. Ct. 853, 122 LE2d 203) (1993). We hold that Georgia law, as described and applied above, is not unconstitutional." *Davis v. State*, 283 Ga. 438, 448 (2008).

Petitioner filed a motion for reconsideration which was denied on April 14, 2008. The Georgia Supreme Court also withdrew its prior opinion issues on March 17, 2008 and issued a substitute opinion, as well as allowing additional time for Petitioner to file a motion for reconsideration of the substitute opinion.

The instant petition for a writ of certiorari was filed on July 14, 2008, from the order of the Georgia Supreme Court affirming the dismissal, without a hearing, of Petitioner's extraordinary motion for new trial, filed shortly before his execution window was scheduled to begin.

PART TWO

STATEMENT OF THE FACTS

At approximately 1:00 a.m. on Saturday, August 19, 1989, Savannah Police Officer David Owens responded to a call of "an officer down" at the Greyhound bus station on Oglethorpe Avenue. (T. 759).[12] Officer Owens found the victim, Mark MacPhail, a 27-year-old Savannah police officer, lying face down in the parking lot of the Burger King restaurant next to the bus station. (T. 759). Officer MacPhail's mouth

[12] The names of those witnesses who testified both at the trial and by way of affidavit at the extraordinary motion for new trial, appear in bold type and their affidavit in Petitioner's appendix to his extraordinary motion for new trial, is referenced in a footnote.

was filled with blood and bits of his teeth were on the sidewalk. As he began administering CPR to the victim, Officer Owens noticed that the victim's firearm was still snapped into his holster. (T. 761).

Larry Young, who was present at the scene, told police that between midnight and 1:00 a.m. he had walked from the Burger King parking lot, which was frequented by transients and homeless individuals, to the convenience store down the block to purchase beer. (T. 797-798). **Sylvester "Red" Coles** saw Young leave the pool hall next door and began following Young demanding a beer. (T. 798). Coles continued to harass Mr. Young all the way back to the Burger King. (T. 799). When Young arrived at the parking lot, **Harriet Murray**[13] and two unidentified men were sitting on a low wall by the restaurant. Petitioner, Troy Anthony Davis, and Daryl Collins, who had taken a shortcut to the parking lot, came out from behind the bank and surrounded Mr. Young. (T. 799). Mr. Coles, who was facing Mr. Young, told him not to walk away "cause you don't know me, I'll shoot you," and began digging in his pants. (T. 845). The two men seated on the wall fled, and Ms. Murray ran to the back door of the Burger King, which was locked. (T. 799). Petitioner, who was behind Young and to his right, blindsided him, striking him on the side of the

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[13] As noted by the Georgia Supreme Court, Ms. Murray's affidavit was not notarized and therefore, the Court disregarded her unsworn statement. *See Davis v. State*, 283 Ga. 438, 443 (2008).

face with a snub-nosed pistol, inflicting a severe head injury which formed the basis of Count III of the indictment. Mr. Young began to bleed profusely, and he stumbled to a van parked in front of the Burger King drive-in window, asking the occupants for help. (T. 803). When the driver did not respond, Petitioner went to the drive-in window, but the manager shut it in his face. (T. 803, 915).

In response to the parking lot disturbance, Officer MacPhail, who was working as a security guard at the restaurant, walked rapidly from behind the bus station, with his nightstick in his hand and ordered the three men to halt. (T. 849). Mr. Collins and Petitioner fled, and Officer MacPhail ran past Sylvester Coles in pursuit of Petitioner. (T. 851). Petitioner looked over his shoulder, and when the officer was five to six feet away, he shot him. Officer MacPhail fell to the ground, and Petitioner walked towards him and shot him again while he was on the ground. (T. 850). One eyewitness testified that Petitioner was smiling at the time. (T. 851). The victim died of gunshot wounds before help arrived.

Thirty minutes after the killing, Red Coles appeared at his sister's house a few blocks from the bus station and asked his sister for another shirt. (T. 915). Shortly thereafter, Petitioner appeared and asked Mr. Coles for the yellow t-shirt Coles had been wearing. After he changed his shirt, Petitioner left. (T. 915). Petitioner fled to Atlanta the following day and surrendered to authorities on August 23, 1989.

Police learned that on the night prior to the killing, Petitioner had attended a party on Cloverdale Drive in a subdivision near Savannah. (T. 1115-1116). During the party, Petitioner, annoyed that some girls ignored him, told several of his friends something about "burning them." (T. 1264). Petitioner then walked around saying, "I feel like doing something, anything." (T. 1264). When **Michael Cooper**[14] and his friends were leaving the party, Petitioner was standing out front. (T. 1120). Michael Cooper was in the front passenger seat, and as the car pulled away, several of the men in the car leaned out the window, shouting and throwing things. (T. 1120, 1186). Petitioner shot at the car from a couple of hundred feet away and the bullet shattered the back windshield and lodged in Michael Cooper's right jaw. (T. 1186). Cooper was treated at the hospital and released and Cooper's injury formed the basis for Count IV of Petitioner's indictment. The shooting incident took place approximately one hour before Officer MacPhail was shot.

Shortly after Michael Cooper was shot, Eric Ellison and **D.D. Collins** picked up Petitioner in Cloverdale and took him to Brown's pool hall in Savannah. Red Coles, wearing a yellow t-shirt, was already at the pool hall.

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[14] Petitioner's Appendix 26 to his extraordinary motion for new trial.

An autopsy revealed that Officer MacPhail was shot twice. One bullet entered the corner of his cheekbone on the left side and exited the back of his neck; the bullet blew away bits of his teeth, and his lip was impaled on his teeth. (T. 782-784). The second bullet passed through the armhole of MacPhail's bullet-proof vest, and entered his chest on the left side. (T. 784). This bullet pierced the lung and the aorta, and lodged in the opposite side between the third and fourth vertebrae, at the back of the chest cavity near the spinal column. (T. 784-787). The cause of the victim's death was a loss of blood from a gunshot wound to the left side of his chest. (T. 789). The pathologist further noted that there were scrapes and lacerations on the victim's arms and legs, and an apparent injury to his right thigh, which could have been grazed by a bullet. (T. 788-789).

A ballistics expert testified that the bullet that wounded Michael Cooper could have been fired from a .38 special revolver or a .357 magnum. (T. 1291). The bullet from MacPhail's body was of the same type and was possibly fired from the same weapon as used in the Cooper shooting. (T. 1292). Four .38 caliber special casings recovered at Cloverdale where Michael Cooper was wounded, were fired from the same gun as casings found at the scene of Officer MacPhail's murder. (T. 1292).

At trial, **Kevin McQueen**,[15] who was incarcerated at the Chatham City jail with Petitioner, testified that Petitioner told him there had been a party in Cloverdale on the night prior to the victim's murder; Petitioner had argued with some boys and there was an exchange of gunfire. (T. 1230-1231). Petitioner told McQueen he did some of the shooting. (T. 1231). After the party, Petitioner went to a girlfriend's house and intended to eat breakfast at Burger King. Petitioner stated that he was with a friend and they ran into a guy who "owed money to buy dope." (T. 1231). There was a fight, Officer MacPhail appeared, and Petitioner shot him in the face. As Officer MacPhail attempted to get up, Petitioner shot him again, because he was afraid MacPhail had seen him that night at Cloverdale. (T. 1232). Petitioner also told McQueen that he was on his way out of town to Atlanta. (T. 1232).

Jeffrey Sapp[16] testified that Petitioner told him he did the shooting at Burger King, but that it was self-defense. (T. 1249-1252). Mr. Sapp noted that Petitioner's street name was "RAH," standing for "Rough As Hell." (T. 1257).

Numerous eyewitnesses identified Petitioner as the perpetrator of the murder, including **Harriet**

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[15] Petitioner's Appendix 13 to his extraordinary motion for new trial.

[16] Petitioner's Appendix 14 to his extraordinary motion for new trial.

Murray,[17] **Dorothy Ferrell,**[18] **Daryl a/k/a D.D. Collins,**[19] **Antoine Williams,**[20] **Steven Sanders**[21] and **Larry Young**.[22]

Petitioner testified at trial and admitted that he was present at the scene of the shooting on the night in question, but denied that he was involved in the shooting of Cooper or the victim or the assault on Larry Young.

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[17] Petitioner's Appendix 3 to his extraordinary motion for new trial.

[18] Petitioner's Appendix 18 to his extraordinary motion for new trial.

[19] Petitioner's Appendix 16 to his extraordinary motion for new trial.

[20] Petitioner's Appendix 20 to his extraordinary motion for new trial.

[21] Petitioner's Appendix 21 to his extraordinary motion for new trial.

[22] Petitioner's Appendix 17 to his extraordinary motion for new trial.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE GEORGIA SUPREME COURT'S FACT-SPECIFIC APPLICATION OF LONG-STANDING STATE LAW REQUIREMENTS GOVERNING EXTRAORDINARY MOTIONS FOR NEW TRIAL PRESENTS NO ISSUE WARRANTING THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

Petitioner seeks this Court's certiorari review of the Georgia Supreme Court's decision applying well-established state court precedent in affirming the denial of Petitioner's extraordinary motion for new trial.[23] The clear existence of a state law basis for the holding of the Georgia Supreme Court in Petitioner's appeal from the denial of his extraordinary motion for new trial, establishes that this decision rests on an adequate and independent state law ground, authorizing the denial of this petition for a writ of certiorari under this Court's longstanding precedent. *See Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.").

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[23] "In light of the following discussion, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary motion for new trial without first conducting a hearing, and, accordingly, we affirm." *Davis v. State*, 283 Ga. 438, 439 (2008).

Petitioner's effort to obtain certiorari review by attempting to obfuscate the true nature of the Georgia Supreme Court's decision is necessitated by the fact that it is clear on the face of the Georgia Supreme Court's opinion that this opinion was solely rooted in that Court's interpretation and application of state case law governing extraordinary motions for new trial.[24] The unmistakable state court basis for the Georgia Supreme Court's opinion is demonstrated by the initial discussion of the legal standard to be utilized by that Court in reviewing Petitioner's appeal from the denial of his extraordinary motion for new trial. The Georgia Supreme Court stated the following:

> Because the statutes authorizing extraordinary motions for new trials are silent as to procedural details, "the procedural requirements for such motions are the product of case law." *Dick v. State*, 248 Ga. 898, 899 (2) (287 SE2d 11) (1982). We have held that a new trial may be granted based on newly-discovered evidence only where the defendant shows each of the following:

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[24] The fact that Petitioner's appeal from the denial of his extraordinary motion for new trial was raised and decided under state law is further demonstrated by Petitioner's citation in his petition to various decisions of Georgia Supreme Court as alleged authority for the need for conducting an evidentiary hearing on extraordinary motions. *See*, Petition for Certiorari, n.18.

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Timberlake v. State, 246 Ga. 488, 491 (1) (271 SE2d 792) (1980). (Citations and punctuation omitted.) "Failure to show *one* requirement is sufficient to deny a motion for a new trial." (Emphasis supplied.) Id. Extraordinary motions for new trial are "not favored," and "a stricter rule is applied to an extraordinary motion for a new trial based on the ground of newly available evidence than to an ordinary motion on that ground." (Citation and punctuation omitted.) *Crowe v. State*, 265 Ga. 582, 590-591 (15) (458 SE2d 799) (1995). A trial court's ruling on such a motion "will not be reversed unless it affirmatively appears that the court abused its discretion. [Cit.]" (Citation and punctuation omitted.) *Young v. State*, 269 Ga. 490, 491-492 (2) (500 SE2d 583) (1998). **For the reasons set forth below, we conclude that the trial court did not abuse its discretion in denying Davis's extraordinary**

> **motion for new trial without first conducting a hearing, particularly in light of the requirement under *Timberlake* that newly-discovered evidence be so material that it probably would result in a different verdict, *Timberlake*, 246 Ga. at 491 (1), and in light of the duty of a defendant to present in the affidavits supporting his or her extraordinary motion for new trial "*facts* sufficient to authorize that the motion be granted." (Emphasis in original.) *Dick*, 248 Ga. at 899 (2).**

Davis v. State, 283 Ga. 438, 440 (2008) (emphasis added).[25]

Therefore, the clearly identifiable basis for the Georgia Supreme Court opinion was its interpretation and application of Georgia caselaw governing extraordinary motions for new trial. The state caselaw basis

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[25] The record is also clear that the trial court's review of Petitioner's extraordinary motion for new trial and its ultimate denial of that motion without a hearing, was based solely on state law and the trial court did not review any "federal question" now being posed by Petitioner. The trial court began its analysis of Petitioner's extraordinary motion by stating, "Although O.C.G.A. § 5-5-41(b) authorizes Defendant to make such a Motion, the Court recognizes that in general, the Georgia Courts do not favor extraordinary motions for new trial. *Dick v. State*, 248 Ga. 898, 899 (1982) . . . Defendant bears a heavy burden in bringing such a motion." (Petitioner's Appendix, p. 22a). "Moreover, an extraordinary motion for new trial that fails to show 'any merit' may be denied a requested hearing. *Dick*, 248 Ga. At 899." (Petitioner's Appendix, p. 23a).

for the Georgia Supreme Court's decision and the fact that the decision is case-specific is made even more plain by the language of footnote two of the Georgia Supreme Court's opinion, in which the Court stated the following:

> We must point out that, contrary to the dissent's implication otherwise, this opinion does not hold and nowhere states that recantations and confessions must be categorically excluded and never considered in cases such as this. Nor do we hold that a trial court has no right to hold a hearing to consider the evidence with which it has been presented. We simply hold that, in dealing with the evidence and in its decision not to hold a hearing, the trial court did not abuse the discretion with which it is empowered by law under the facts of this case.

Davis v. State, 283 Ga. 438, 439 (2008).

Therefore, contrary to Petitioner's assertions, the Georgia Supreme Court did not establish any categorical rules about the consideration of alleged recantations during extraordinary motion for new trial proceedings, nor about whether a hearing would never be necessary to consider such an extraordinary motion. A review of the decision shows that the Georgia Supreme Court merely determined, applying state law, that no evidentiary hearing was required to consider Petitioner's proffered affidavits, as well as determining that the proffered affidavits did not

present facts which would warrant the granting of the extraordinary motion.

Petitioner has not substantiated his assertion that his "due process" claim was raised in the courts below,[26] but even assuming arguendo that any alleged federal claim was presented to the state courts, it is apparent that the resolution of any alleged federal question was not the basis for the state court decision.

The granting of certiorari in this case is clearly unwarranted, as the record demonstrates that Petitioner is merely seeking to have this Court "correct a state court judgment." As this Court explained in *Herb v. Pitcairn*, "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our

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[26] In Petitioner's application for appeal filed in the Georgia Supreme Court, Petitioner merely alleged that, "the lower court never evaluated the merits of this evidence, but instead erroneously relied upon a general prohibition that '[a] post-trial declaration by a State witness that his former testimony is false is not cause for a new trial.'" (Application, p. 4, citing trial court order at page 3). Even though the application made passing reference to the Sixth, Eighth and Fourteenth Amendments (Application, p. 7), Petitioner alleged on appeal that he had "met all requirements for an extraordinary motion for new trial." (Application, p. 30).

review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). To review this decision of the Georgia Supreme Court based on state law grounds, would result in the issuance of a mere advisory opinion by this Court and therefore, certiorari should be denied.

The Georgia Supreme Court's interpretation and application of state court decisions governing extraordinary motions for new trial, in the context of the particular facts of Petitioner's case[27] and the lengthy procedural history of Petitioner's post-conviction challenges, constitutes an adequate and independent state ground which warrants the denial of this petition for a writ of certiorari. *See Herb v. Pitcairn*, 324 U.S. 117 (1945).

II. PETITIONER'S CASE IS AN INAPPROPRIATE VEHICLE FOR DETERMINING AN EIGHTH AMENDMENT "INNOCENCE" CLAIM WHICH HAS BEEN REPEATEDLY LITIGATED DURING PETITIONER'S STATE AND FEDERAL HABEAS CORPUS PROCEEDINGS.

Petitioner has failed to substantiate his assertion that his case "presents an ideal vehicle" to litigate his

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[27] This Court has repeatedly emphasized that it does not grant certiorari to "review specific facts." *See United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

Eighth Amendment "innocence" claim.[28] Petitioner has previously litigated his Eighth Amendment "innocence" claim using numerous legal "vehicles."

The procedural history of Petitioner's case authorizes the denial of certiorari, as it belies Petitioner's assertion that "no court has ever examined Petitioner's new evidence to determine if he is innocent." Respondent's Appendix 1 (Respondent's Chart Listing Exhibits Offered By Petitioner During Extraordinary Motion for New Trial), visibly demonstrates that the majority of Petitioner's affidavits have previously been presented and reviewed in state and federal habeas proceedings. It is clear from examining the procedural history, that Petitioner's current challenge to the eyewitness testimony given during his trial is merely the latest of Petitioner's repeated challenges to this trial testimony. Petitioner has availed himself of numerous opportunities to challenge the eyewitness testimony identifying him

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[28] Petitioner mentions cases in which post-conviction DNA evidence is offered to attempt to establish the "innocence" of a petitioner, but DNA evidence plays no role in Petitioner's case and Petitioner's reference to these cases is irrelevant to this case which primarily involves alleged "recantations" of the trial testimony of certain witnesses. In fact, Georgia has enacted a separate and distinct statutory post-conviction DNA statute which was not at issue in the instant case. *See Crawford v. State*, 278 Ga. 95, 96 (2004), holding that, "The newly-adopted DNA testing statute requires a trial court to conduct a hearing only if a defendant's motion 'complies with the requirements of paragraphs (3) and (4)' of the statute. *O.C.G.A. § 5-5-41 (c)(6)(A).*"

as the shooter. In fact, as shown by the content of defense counsel's closing argument at trial, Petitioner made such a challenge the centerpiece of his trial defense.

The instant petition for certiorari is not an appropriate vehicle in which to review Petitioner's latest challenge to the eyewitness testimony presented at his trial, which has been reviewed on numerous occasions by state and federal courts, as this Court does not grant certiorari to "review specific facts." *See United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

This Court should deny this petition for certiorari as this case is not a proper vehicle for a relitigation of Petitioner's Eighth Amendment "innocence" claim.

III. PETITIONER'S NEWLY-CRAFTED EFFORT TO ELEVATE AN EXTRAORDINARY MOTION FOR NEW TRIAL PROCEEDING TO A PROCEEDING CREATING A LIBERTY INTEREST "REQUIRING" A HEARING, PRESENTS NO LEGITIMATE BASIS FOR THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

Petitioner alleges that this Court should grant certiorari "to consider if the State-created liberty interest in a new trial . . . invokes the protections of procedural due process when a defendant in a capital case presents substantial new admissible evidence of innocence." (Petition, p. 3). This contention is based

on several unproven premises, namely, Petitioner's unfounded assertion that there exists a "State created liberty interest in a new trial," that he has presented "substantial new admissible evidence of innocence" so as to implicate Eighth Amendment concerns and that this newly-crafted "liberty interest" claim was raised and considered as a federal question in the Court below.

Petitioner has availed himself of due process protections throughout his state and federal habeas corpus proceedings, and appears to "create" the "liberty interest" theory, to avoid the roadblocks which he would have to surmount to file successive state and federal petitions in an attempt to relitigate his "Eighth Amendment innocence claim."

As already noted, Petitioner's assertion in the Georgia Supreme Court was that the trial court should have granted him a hearing under state law governing extraordinary motions for new trial, not that state procedures had created a liberty interest that implicated due process concerns. Therefore, this Court should decline to review a federal law "liberty interest" claim not raised and considered in the court below. This Court has stated in such cases as *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987), citing *Heckler v. Campbell*, 461 U.S. 458, 468-469, n.12 (1983), that it will not consider grounds which were not presented to court below, except "in exceptional cases." The state court's interpretation of state case law does not constitute such an exceptional case.

Additionally, assuming arguendo that Petitioner's "liberty interest" claim is viable in this procedural context, the Georgia Supreme Court made clear that it was not reaching any ultimate due process questions in this case, nor making "categorical" pronouncements about recanted testimony or the necessity for conducting hearings, but was merely holding that, in this case, "dealing with the evidence and in its decision not to hold a hearing, the trial court did not abuse its discretion with which it is empowered under the facts of this case." *Davis v. State*, 283 Ga. 438, 439 n.2 (2008). Therefore, because the Georgia Supreme Court did not reach or apply broad federal due process principles, but rather merely applied state law to the facts of Petitioner's case, certiorari should be denied.

The fact that the relief sought by Petitioner in this petition for certiorari also demonstrates that there is no federal question in this case warranting this Court's review. Petitioner merely seeks a remand for an evidentiary hearing under state law principles, rather than seeking to have Georgia's extraordinary motion for new trial procedure declared unconstitutional. Therefore, Petitioner's "liberty interest" contention is merely "academic" in the context of this case and does not warrant the grant of certiorari. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) ("The legal problem must be "beyond the academic or the episodic.").

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX 1

RESPONDENT'S CHART LISTING EXHIBITS OFFERED BY PETITIONER DURING EXTRAORDINARY MOTION FOR NEW TRIAL

APPENDIX	INDIVIDUAL	DATE GIVEN	STATEMENT OR AFFIDAVIT FIRST PRESENTED IN
Appendix A	Isaiah Middleton (juror)	dated July 3, 2007	extraordinary motion for new trial (2007)
Appendix 1	Gary Hargrove	dated Aug 17, 2001	federal habeas corpus court (2003)
Appendix 2	Joseph Washington	dated Dec 5, 1996	federal habeas corpus court (2003)
Appendix 3	Harriet Murray	dated Oct 10, 2002	federal habeas corpus court (2003)
Appendix 5	Anthony Hargrove	dated Aug 8, 2001	federal habeas corpus court (2003)
Appendix 6	Shirley Riley	dated Aug 18, 2001	federal habeas corpus court (2003)
Appendix 7	Darold Taylor	dated Aug 20, 2001	federal habeas corpus court (2003)
Appendix 8	Tonya Johnson	dated Dec 6, 1996	federal habeas corpus court (2003)
Appendix 9	Anita Dunham Saddler	dated July 10, 2002	federal habeas corpus court (2003)
Appendix 10	April Hester Hutchinson	dated July 9, 2002	federal habeas corpus court (2003)
Appendix 11	Peggy Grant	dated July 11, 2002	federal habeas corpus court (2003)
Appendix 12	Daniel Kinsman	dated Oct 17, 2002	federal habeas corpus court (2003)
Appendix 13	Kevin McQueen	dated Dec 5, 1996	state habeas corpus court (1996)
Appendix 14	Jeffrey Sapp	dated Feb 9, 2003	federal habeas corpus court (2003)
Appendix 15	Monty Holmes	dated Aug 17, 2001	federal habeas corpus court (2003)
Appendix 16	D.D. Collins	dated July 11, 2002	federal habeas corpus court (2003)
Appendix 17	Larry Young	dated Oct 11, 2002	federal habeas corpus court (2003)
Appendix 18	Dorothy Ferrell	dated Nov 29, 2000	federal habeas corpus court (2003)
Appendix 20	Antoine Williams	dated Oct 12, 2002	federal habeas corpus court (2003)
Appendix 21	Stephen Lloyd Sanders	given Aug 18, 1989	federal habeas corpus court (2003)
Appendix 22	April Hester	dated Nov 30, 1995	state habeas corpus court (1996)
Appendix 23	Abdus Karim	dated Oct 8, 2002	federal habeas corpus court (2003)
Appendix 24	Robert Grizzard	dated March 23, 2003 given August 19, 1989	federal habeas corpus court (2003)
Appendix 25	Benjamin Gordon	dated Feb 10, 2003	federal habeas corpus court (2003)
Appendix 26	Michael Cooper	dated Feb 10, 2003	federal habeas corpus court (2003)
Appendix 27	April Hester	dated Aug 19, 1989	federal habeas corpus court (2003)
Appendix 28	Joseph Blige	dated Dec 1, 1995	state habeas corpus court (1996)
Appendix 29	Lamar Brown	dated Nov 2, 1995	state habeas corpus court (1996)
Appendix 30	Jeffrey Neuschatz	dated July 6, 2007	extraordinary motion for new trial (2007)
Appendix 31	Kelly Fite	dated April 18, 2003	federal habeas corpus court (2003)
Appendix 32	Curtis Wilson (juror)	dated July 6, 2007	extraordinary motion for new trial (2007)
Appendix 33	Cynthia Quarterman (juror)	dated July 12, 2007	extraordinary motion for new trial (2007)
Appendix 34	Brenda Forrest (juror)	dated July 13, 2007	extraordinary motion for new trial (2007)

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NO. 08-66

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE - EXECUTION SET FOR SEPTEMBER 23, 2008

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September 9, 2008

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REPLY TO BRIEF IN OPPOSITION

The State of Georgia cannot execute Mr. Davis without any substantive post-trial process. The crux of Respondent's argument is that the "procedural history of Petitioner's case authorizes denial of certiorari." In other words, Respondent argues that the trial verdict and post-trial proceedings -- none of which included an evidentiary hearing to examine Mr. Davis' new evidence of innocence -- are sufficient procedure to ensure guilt. In this case, procedure without substance is not constitutionally sufficient. Further, Mr. Davis' petition to this Court attacks the constitutional sufficiency of the process by which the Georgia Supreme Court came its conclusion (i.e., determining materiality of Mr. Davis' evidence without a hearing). Respondents argument that the court's conclusion itself is a "adequate and independent" State ground for dismissal is unsound. Lastly, a hearing in this case is the minimal due process required because Mr. Davis was convicted solely on the credibility of State witnesses.

I. No Court Has Determined if Mr. Davis' New Evidence Shows He is Innocent

Contrary to Respondent's assertion, a thorough review of the procedural history in this case shows that Mr. Davis has never had an opportunity to prove his innocence. Despite repeated requests, Mr. Davis has never been granted an evidentiary hearing to evaluate his new evidence.

A. State Habeas Corpus Proceedings (1994-1997)

The State habeas court did not consider any of Mr. Davis' new innocence evidence. The Georgia Appellate Practice and Educational Resource Center filed a state habeas corpus petition on behalf of Mr. Davis on November 6, 1996 with 33 affidavits. Of the 33 affidavits, only 6 had any bearing on Mr. Davis' innocence. *See* Respondent's Brief in Opposition at Appendix 1 (listing affidavits submitted with Mr. Davis' 2007 Extraordinary Motion for New trial with a column indicating the forum to which the affidavit was first presented). The 6 affidavits submitted to the State habeas court contained only 1 of the 7 recantations Mr. Davis presented to the Georgia Supreme Court (the affidavit of Kevin McQueen). The issue at the State habeas evidentiary hearing dealt only with constitutional claims. Petitioner declined to present the 6 witnesses as the lion's share of his new innocence evidence (6 additional recantations and affidavits implicating and identifying Sylvester "Redd" Coles as the shooter) had yet to be discovered. The lion's share of Mr. Davis' innocence evidence submitted in his 2007 Extraordinary Motion for New Trial came to light during the federal habeas proceeding, which occurred 5 years after the State proceeding. *See id.*

Further, the State habeas court refused to make an innocence determination, holding that such fact finding was a "presumptuous usurpation" of the jury and that the State habeas court "is limited to evaluating whether Mr. Davis' rights were properly protected in the context of his jury trial." *See* Respondent's Brief in Opposition at 12 (*citing* State Habeas Corpus Order of 9/5/97 at p. 41). The federal habeas court recognized that the State habeas court had not relied on any of the 6 affidavits when it noted "the state court did not specifically refer to, and apparently did not rely on, any [of the 6 affidavits] in ruling on petitioner's habeas corpus

petition ..." Federal Habeas Court Order of 3/10/03 at 5 n. 1; 38.

B. Federal Habeas Corpus Proceedings (2001-2004)

During the federal habeas proceeding, Mr. Davis obtained the bulk of the affidavits that demonstrate his innocence and immediately submitted them to the federal habeas court and requested an evidentiary hearing. *See* Respondent's Brief in Opposition at Appendix 1.

The federal habeas court summarized Mr. Davis' new affidavits but did not admit them as part of the record, conduct any factual analysis or allow an evidentiary hearing.[1] Respondent concedes that "[t]he federal habeas court expressly stated that it would consider all of the material admitted during the *state* habeas proceedings." *See* Respondent's Brief in Opposition at 15 (emphasis added). As discussed above, the "material admitted during the State habeas proceeding" consisted of only 6 affidavits. *See id.* at Appendix 1. The federal habeas court declined to hold an evidentiary hearing or consider the lion's share of Mr. Davis' innocence evidence -- affidavits submitted for the first time in federal court -- because it found that the evidence was procedurally barred by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2).[2]

Respondents assertion that the federal habeas court examined Mr. Davis' innocence evidence is not supported by

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[1] *See* Federal Habeas Court Order of 3/10/03; Federal Habeas Court Order of 4/14/04.

[2] Federal Habeas Court Order of 3/10/03; Federal Habeas Court Order of 4/14/04.

the record. In the portions of the record cited by Respondents, the court summarized some of the affidavits and held that AEDPA did not allow the court to hold an evidentiary hearing on Mr. Davis' ineffective assistance of counsel claim "even if" the evidence showed his innocence.[3] Since the court believed that Mr. Davis did not meet the AEDPA's procedural requirements, the court did not hold an evidentiary hearing or consider the innocence question.[4] Thus, in no instance did the federal habeas court -- as asserted by the Respondent -- find that Mr. Davis "failed to establish he was factually innocent" or determine whether the new evidence "would undermine the court's confidence in the outcome of the proceedings."

C. Eleventh Circuit Court of Appeals

The Court of Appeals' declined to address Mr. Davis' innocence claim. Instead, the court found only that Mr. Davis' trial was free from constitutional error. *Davis v. Terry*, 465 F.3d 1249, 1253 (2006). The court bypassed the gateway innocence question and addressed only "the question of whether the district court erred in concluding that Davis' constitutional claims of an unfair trial" *See id.*

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[3] *See* Federal Habeas Court Order of 3/10/03 at 5-22; 37-41.

[4] *See id.* at 40-41; *see also* Federal Habeas Court Order of 4/14/04, *denying renewed motion for an evidentiary hearing* at 2 ("A showing of actual innocence does not, however, abrogate the requirements of [AEDPA] § 2254 (e)(2) so as to require -- or even allow -- an evidentiary hearing ....")

D. Extraordinary Motion for New Trial (2007-2008)

Immediately after this Court denied Mr. Davis certiorari, Mr. Davis filed a motion for new trial provided for under Georgia law in the Savannah trial court. The trial court denied Mr. Davis' motion and his request for an evidentiary hearing without addressing the substance of the 7 recantation affidavits or the evidence implicating Redd Coles. *See* Petition for Certiorari Appendix B at 24a-25a.

The day before Mr. Davis' scheduled July 17, 2008 execution date, the Georgia Board of Pardons and Parole held a hearing and questioned five witnesses, including 4 of the 7 recanted witnesses. Immediately after the hearing, the Board issued a 90-day stay.

After the stay was issued, the Supreme Court of Georgia granted Mr. Davis' appeal. Contrary to Respondent's assertion, Mr. Davis raised claims in the trial court and Georgia Supreme Court that due process requires an evidentiary hearing to vindicate his Eighth Amendment and State-created rights. In its initial opinion, the Supreme Court of Georgia declined to address Mr. Davis' constitutional claims at issue in this petition because it erroneously believed that the claims were "not asserted distinctly in the trial court." In his Motion for Reconsideration, Mr. Davis presented the Georgia Supreme Court with his July 13, 2007 supplemental trial court brief raising the constitutional claims at issue in this petition. Realizing its error, the Supreme Court of Georgia withdrew this portion of its opinion and issued a substitute opinion holding that "Davis argued in the trial court that to apply Georgia's procedures for extraordinary motions for new trial in a manner that allows for his execution would be unconstitutional. Georgia law, as described and applied above, is not unconstitutional." *Davis v. State*, 283 Ga. 438, 448 (2008)(citing *Herrera*).

A bare majority of the Supreme Court of Georgia affirmed the trial court, leading to the instant Petition for Certiorari. The Georgia Supreme Court concluded that Mr. Davis' new evidence did not warrant a new trial or an evidentiary hearing because the facts stated in his affidavits were not so material as to probably result in a different verdict. Mr. Davis files the instant Petition attacking the constitutional sufficiency of the process by which the Georgia Supreme Court came to such a conclusion (i.e., determining materiality of recantations without reference to credibility, which, in this case, only a hearing could determine).

II. Factual Findings Resulting From an Unconstitutional Process Are Not "Adequate and Independent" State Grounds for Dismissal

Federal courts will not disturb State judgments if there is an adequate and independent state ground for the decision. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). However, the conclusion reached in a constitutionally deficient process is not an "adequate or independent" State ground for dismissal. The Georgia Supreme Court held that Georgia's procedures for extraordinary motions for new trial, as described and applied by the court, are "not unconstitutional." *Davis*, 283 Ga. at 448; Petition App. A at 16a.

Respondent argues that the Georgia Supreme Court's finding that Mr. Davis' new evidence was not "so material that it would probably result in a different verdict" is an independent and adequate state ground for dismissal.[5] The crux of Mr. Davis' federal claims, however, is that the

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[5] Respondent's Brief in Opposition at 31-32; *see also Davis*, 283 Ga. at 440.

process the State courts used to conclude his new evidence was immaterial was constitutionally deficient. In other words, the State courts' failure to hold an evidentiary hearing was sure to "invite arbitrariness and error" in the determination that Mr. Davis' new evidence was not "so material as to probably result in a different verdict." Thus, the state grounds for declining to hold an evidentiary hearing -- the court's conclusion that Mr. Davis' evidence was immaterial -- is not an independent of his federal claims since the process by which the state ground was determined was constitutionally flawed.

Several cases discussed in Mr. Davis' Petition demonstrate the fallacy of Respondent's argument. For example, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court determined that the process employed by Florida to determine whether an inmate facing execution was sane did not provide sufficient due process. The Florida statute left insanity determinations to the Governor. The Florida Governor determined Ford was sane without holding a hearing. This Court found that the Florida fact-finding procedure "invites arbitrariness and error ... [and] does not, therefore comport with due process" and ordered an evidentiary hearing. *Id.* at 424. *See also Panetti v. Quarterman*, 127 S.Ct 2842 (2007) (finding a State court's sanity determination violated due process because the State court did not hold a hearing or allow the condemned inmate to submit insanity evidence, which invited "arbitrariness and error" into the State court's conclusion).

Applying Respondent's argument to these cases, this Court would have had no jurisdiction to decide *Ford* or *Panetti* because the State's initial determination that the Ford or Pannetti were sane -- regardless of the process used to come to those conclusions -- would have been an independent and adequate State ground for the decision.

This Court in *Vitek v. Jones*, 445 U.S. 480 (1980), addressed an argument similar to Respondent's, holding:

> [I]f the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, **'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.' These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.** In *Morrissey*, *Gagnon*, and *Wolff*, the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. 445 U.S. at 490-91 (emphasis added).

Further, the mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). Here, the Georgia Supreme Court clearly denied Mr. Davis an evidentiary hearing based on its assessment that the affidavits did not state "facts sufficient" to grant a motion "in light of the requirement [under State law] that newly-discovered evidence be so material that it probably would result in a different verdict." *Davis*, 283 Ga. at 440; Petition App. A at 5a. The Court offered no other basis to deny the evidentiary hearing.

Thus, any other State ground Respondent alleged was "adequate or independent" does not deny this Court jurisdiction.

Lastly, this Court has often held that a State rule is not "adequate" for dismissal unless it is "strictly or regularly followed." *Johnson*, 486 U.S. at 587 (citing cases). Mr. Davis cited several Georgia cases showing that Georgia Courts, including the Georgia Supreme Court, have often ordered hearings in recantation cases with far less evidence than presented here. *See* Petition at 28 with accompanying n. 18 (citing examples of single recantation cases in which an evidentiary hearing was ordered).

III. An Evidentiary Hearing in this Case is Appropriate Because Mr. Davis Was Convicted Solely on the Credibility of State Witnesses

This Court has held that procedural due process requires "protections as the particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Respondent concedes that Mr. Davis' trial hinged largely on the credibility of State witnesses. The vast majority of those witnesses have now recanted in sworn statements. Thus, Mr. Davis' guilt hinges largely on credibility that, in this case, can only be determined by an evidentiary hearing.

A. The Objective Facts Adduced At Trial Do Not Point To Mr. Davis As the Shooter

The objective evidence (i.e., evidence that is undisputed, physical evidence or evidence that does not require a credibility determination) implicates Redd Coles as the shooter.

(i) The Murder of Officer MacPhail in the Greyhound Parking Lot

The objective trial evidence showed that Officer MacPhail was murdered by Redd Coles with a .38 caliber revolver after pistol-whipping Larry Young. Larry Young walked by Redd Coles with a six-pack of beer. Coles demanded that Young give him a beer. Young refused and walked away. Coles began following and loudly harassing Young. Bystanders to the Coles-Young argument, including Mr. Davis, followed the scuffle. Mr. Davis did not utter a word. As Young tried to retreat, Coles threatened Young by stating "you don't know me, I'll shoot you" and began digging in his pants for a gun. Moments later, Young was struck in the head with a gun. Young yelled out and Officer MacPhail responded. MacPhail was shot dead with a .38 caliber revolver by Young's assailant.

An hour before Officer MacPhail was killed in the parking lot of the Greyhound bus station, Michael Cooper was shot when the car in which he was riding came under fire from an unidentified gunman. Shell casings found near the car shooting matched a casing found near Coles' home and the Greyhound bus station where Officer MacPhail was killed. The shell casings were fired from a .38 caliber revolver. Mr. Coles admitted to carrying a .38 caliber revolver on the night of the shootings but was unable to produce it for ballistics testing.

Coles visited the police station the next day with his lawyer and implicated Troy Davis. Before Coles' initial statement, the police had no suspects. The same day, the police searched Mr. Davis' house and found no gun. The police did not search Redd Coles' house for his .38 caliber revolver and never included Coles' picture in photo line-ups shown to witnesses.

(ii) The State's Case Relied Entirely on the Credibility of Nine State Witnesses

On Monday August 21, 1989, the Savannah newspaper ran Troy Davis' picture on the front page under the headline "POLICE PUSH HUNT FOR KILLER." Wanted posters with Troy Davis' picture were plastered around the crime scene where most of the eyewitnesses lived or worked and Troy's picture was used extensively on the evening news. Mr. Davis and Redd Coles are both African-American males that were of similar age, height and weight.

State eyewitnesses identified Troy Davis in a Coles-free photographic line-up well after Mr. Davis' picture had widely circulated in the media. These witnesses' testimony contradicted earlier police statements that implicated Coles, were recanted at trial or were solely in-court identifications given two years after the shooting. The remaining three State witnesses consisted of a jailhouse snitch who testified to widely inaccurate facts and two witnesses who partially recanted their police statements at trial and testified that their police statements (used as affirmative evidence against Mr. Davis) were the product of intimidation by the investigating detectives.

All credible State witnesses have recanted their testimony. Seven of the nine State witnesses have recanted their testimony. The only remnants of the State's case against Mr. Davis is the self-interested testimony of Redd Coles and the identification Steve Sanders gave for the first time at trial, two years after the shooting that contradicted his initial police statement that "he wouldn't recognize the shooter again if he saw him."

Only an evidentiary hearing would show that the State witness recantations are credible. The cumulative effect of the 7 recantations combined with several witnesses who implicated or identified Redd Coles in post-trial affidavits would, if found credible, eviscerate the State's case against Mr. Davis and show that the new evidence is "so material as

to probably result in a different verdict." Thus, the minimum due process appropriate in this case is an evidentiary hearing to assess the credibility and cumulative materiality of the new evidence. *The State of Georgia cannot execute Mr. Davis* without any substantive post-trial process.

Respectfully submitted,

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September 9, 2008

MOTION FILED
AUG 15 2008

(3)

No. 08-66

IN THE

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INNOCENCE PROJECT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Deirdre O'Connor[1] (Of Counsel) and Barry C. Scheck, Peter J. Neufeld, and David Loftis of the Innocence Project, Inc., ("the Project") hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Supreme Court of Georgia. Petitioner Troy Davis has consented to the filing of this brief. Respondent State of Georgia has withheld consent.

As set forth in the accompanying brief, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence.

The Project is greatly concerned that the Georgia Supreme Court has set an impossibly high standard preventing Mr. Davis and other innocent Georgians from having evidence of innocence heard. Accordingly, the Project respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

Deirdre O'Connor
Of Counsel of Record for
Innocence Project, Inc.

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[1] Deirdre O'Connor's application for admission to the United States Supreme Court bar has been processed. She is scheduled for admission on August 18, 2008.

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INTEREST OF AMICUS CURIAE[1]

The Innocence Project, Inc. ("the Project") is a nonprofit legal clinic and resource center created by Barry C. Scheck and Peter J. Neufeld. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 218 innocent persons, and served as counsel or provided critical assistance in a majority of these cases.

The advent of forensic DNA testing and the use of such testing to review criminal convictions have provided scientific proof that our system convicts innocent people, and that wrongful convictions are not isolated or rare events. Although there are untold numbers of cases in which people have been wrongfully convicted but there is no DNA evidence that can scientifically prove their innocence, DNA testing has opened a window into wrongful convictions so that we may study the causes of this injustice and recommend

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[1] Counsel of record for all parties received notice of the *Amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner has consented to the Network's filing of this brief and Respondent has withheld consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

practices to minimize the chance of its occurrence. [2]

SUMMARY OF ARGUMENT

Innocence does not fade with the passage of time. Perjured testimony and other forms of unreliable evidence, though, often cannot withstand the test of time or the evolution of science. At the heart of the Troy Davis case are questions of innocence and fabricated evidence. Seven recanting witnesses – many of whom provided highly implausible testimony at trial – and the nine additional witnesses implicating Redd Coles, undermine our confidence in the verdict and compel a meaningful reexamination of all the evidence.

The Georgia Legislature created a state right to a new trial for the wrongfully convicted who can establish that new evidence of innocence "would probably produce a different verdict." O.C.G.A § 5-5-23; *Timberlake v. State,* 246 Ga. 488; 271 S.E.2d 792 (1980). By its terms it provided for a meaningful review of Mr. Davis case, and indeed a new trial. He received neither.

In *Davis*, the Georgia Supreme Court changed the statute's materiality standard to require proof of the *purest fabrication* in witness recantation cases. As interpreted, this is an unattainable measure that necessarily thwarts the statutorily conferred right to obtain relief from a wrongful conviction, thus denying due process

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[2] Appendix contains summary biographies of other signatories.

to anyone whose conviction was secured via perjured testimony.

As nearly half of the Georgia Supreme Court justices recognized, the purest fabrication standard is so "rigid" that the "fundamental question [of] whether or not an innocent person might have been convicted or even, as in this case, might be put to death" went unanswered. *App. A.* at 17a.

This decision creates a rule of law authorizing categorical denial of due process for innocence cases in Georgia. It gives the trial court complete freedom to dismiss evidence of innocence without evaluating its reliability, subverting the well-considered, truth-seeking function of post-conviction proceedings proscribed by the legislature. This new judicially-minted, purest fabrication standard will result in the imprudent disregard of reliable evidence of innocence.

Critically, the *Davis* majority, constricted by its own newly-crafted standard, ignored scientifically supported concerns that the evidence used to convict Mr. Davis was unreliable. The now-disavowed trial testimony included reports of perception and memory beyond human capacity. Even the two non-recanting witnesses, Redd Coles (who has now been identified by nine people as the shooter) and Stephen Sanders, presented inherently incredible and scientifically implausible testimony.

Evidence of innocence should not go unheard especially in a case, like Mr. Davis', where the conviction was based on scientifically unreliable evidence and the legislature has

provided a remedy to hear such claims. Deeply rooted in our notion of justice is the recognition of the court's duty to protect the innocent. A panoply of constitutional safeguards guarantees the accused a fair trial so that society can trust findings of guilt. The hallmark of a *fair* trial is its ability to successfully fulfill its truth-seeking function. In any quest for truth, the *reliability* of the evidence should take center stage. When new information surfaces after trial that causes reasonable people to lose confidence in the jury's guilty verdict – whether it is due to the ineffective performance of defense counsel, the failure of the prosecutor to disclose material evidence, or the realization that unreliable and false testimony resulted in the conviction of an innocent person – our commitment to justice and truth compels corrective action and a process through which that can occur. The Georgia legislature has provided an avenue for redress of such claims, but its Supreme Court arbitrarily and capriciously foreclosed claims stemming from perjury, and subsequent recantation.

The time has come for this Court to articulate the minimum requirements for a constitutionally adequate procedure so that claims of wrongful convictions based on fabricated testimony can be properly evaluated and innocent people protected.

ARGUMENT

I. A Deeply Divided Court Created A Rule Of Law Authorizing Categorical Denial Of Due

Process For Innocent Georgians Convicted On The Word Of Perjurers.

The Georgia legislature created a right to a new trial for any wrongfully convicted person who can establish that new evidence of innocence "would probably produce a different verdict." O.C.G.A § 5-5-23; *Timberlake v. State,* 246 Ga. 488; 271 S.E.2d 792 (1980). The Legislature did not limit or classify the new evidence, but rather broadly asserted that a petitioner could present "any material evidence" to meet this standard. This statute unambiguously creates a liberty interest by conferring the right to a new trial once the "substantive predicates' have been met."[3] *Board of Pardons v. Allen,* 482 U.S. 369 (1987). This right exists independent of the evidentiary cause of the wrongful conviction and recantation evidence that is "material" fits comfortably within the statute's ambit.

It is a well-established due process principle that once a state has created a statutory scheme affecting a litigant's rights and interests, it must provide "'a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings" *Tennessee v. Lane,* 541 U.S. 509, 523 (2004) (*citing Boddie v. Connecticut,* 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996)). Here, the court's arbitrary construction of the statute, under its rigid purest fabrication standard, imposes unconstitutional obstacles to full participation for those seeking relief from wrongful convictions based on

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[3] *Amici* incorporate by reference the petitioner's arguments on this point.

demonstrably false testimony. This arbitrary construction will undoubtedly have the innocent languish in prison, and unduly risks wrongful execution – concerns, which the post-conviction statutory scheme undoubtedly sought to address.

It is axiomatic that some witnesses commit perjury. And, despite the system's truth-seeking function, some perjurers get away with it. Mark Curriden, *The Lies Have It: Judges Maintain That Perjury Is on the Rise, but the Court System May Not Have Enough Resources to Stem the Tide*, A.B.A.J., May 1995, at 68; see also Jonathan Liebman and Joel Cohen, *Perjury and Civil Litigation*, 20 Litig. 43 (1994); Lisa Harris, Perjury Defeats Justice, *42 Wayne L. Rev. 1755 (1996)* ("Perjury has thus far evaded all solutions, is pervasive in the courtroom, and is on the increase."). *Id.* at 1755. Indeed, "[m]any lawyers answer that [perjury] is the natural result, and the tolerable cost, of an adversary system of justice." Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 Duq. L. Rev. 715 (1998). In *The Supreme Court on Trial: How the American Justice system Sacrifices Innocent Defendants*, George C. Thomas III concludes that "we have a problem with [ ] perjury" and other categories of false evidence. *Id.* at 39. "It is the too frequent failure of the adversary system itself that produces wrongful convictions." *Id.*.

For perjurers who are later moved to speak the truth, their recantations are received with a disproportionate skepticism that can perpetuate

eternal injustice.[4] Shawn Armbrust, *Reevaluating Recanting Witnesses: Why The Red-Headed Stepchild Of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75 (2008); Daniel Medwed, *Anatomy Of A Wrongful Conviction: Theoretical Implications And Practical Solutions*, 51 Vill. L. Rev. 337 (2006); Alexandra Natapoff, *The Faces Of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute To Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 (2006); Brian Murray & Joseph C., *He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness*, 27 N.E. J. on Crim. & Civ. Con. 1 (2001); Sharon Cobb, *Gary Dotson As Victim: The Legal Response To Recanting Testimony*, 35 Emory L.J. 969 (1986); Janice J. Repka, *Rethinking The Standard For New Trial Motions Based Upon Recantations As Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433* (1986); Daniel Wolf, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 Mich. L. Rev. 1925 (1985).

The Georgia Legislature developed a sound analytical framework for undertaking this problem

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[4] *Amici* acknowledge that not all recanting witnesses have committed perjury. Every recanter necessarily asserts that their trial testimony was inaccurate. Some were simply mistaken or improperly influenced to believe the falsity; their testimony was inaccurate, but honest. Others knowingly told an untruth. It is the latter ilk that is most prevalent in Mr. Davis case and the most troubling for courts. For simplicity sake, this brief uses perjurer interchangeably with recanting witness. *Amici* recognize that witnesses who lie out of fear prompted by police intimidation or out of concern that the true perpetrator will cause them harm are deserving of greater empathy than connoted by the label of perjurer.

within its statutory scheme. If the recantations were material, i.e., probably produce a different outcome, a new trial is required. The Georgia Supreme Court, however, arbitrarily placed its own effectively insurmountable hurdled onto such claims, requiring proof of the purest fabrication. Even worse, here, it decided that the failure to meet such a standard could be determined without a hearing though there were seven recantations.

Indeed, the Davis court held that each of the seven recantation "affidavits lack[ed] the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the 'purest fabrication.'" *App. A.* at 7a; see also 8a-10a. It is hard to imagine any recantation – or collection of recantations – that could satisfy this standard. As noted by the dissent, the undeniable effect of the holding is to categorically exclude recantations. *App. A.* at 18a.

By definition, a recantation always involves a prior inconsistent version, e.g., "I lied when I said X, Y is really the truth." It can never, on its own, conclusively prove the falsity of the first version. The most to which a recantation can aspire is to *ultimately*, at trial, be the more persuasive of two competing versions of fact. Requiring proof of the purest fabrication as a threshold to justify a new trial necessarily translates into a categorical exclusion.

Indeed, the court's analysis in this very case demonstrates the impossibility of meeting its standard. The court parsed each statement individually trying to determine whether it alone

met the pure fabrication standard. It, however, refused to engage in reviewing the collective impact of the seven recantations taken together. Moreover, by deeming the evidence mere recantation, it did not properly weigh the scientific testimony. The statute, which requires an assessment of any material evidence, would require the court to weigh the impact of the statements collectively and in conjunction with the supporting scientific evidence.

The Georgia court denied even a hearing on the issue -- though, nonetheless, claiming not to foreclose the possibility of hearings to subsequent litigants. *App. A.* at 3a. But it is unclear what purpose a hearing would serve if the post-conviction court were not then authorized to make a finding that a recantation was sufficiently reliable to warrant a new trial. No matter how great the indicia of reliability, the recantation will always compete with the earlier version. A judge may find the recantation more credible, but could not find, as a matter of law, that the original version was the purest fabrication.

No longer tethered to any statutory moorings, post-conviction courts now have unfettered discretion to deny claims where there is objectively material evidence mandating a new trial. Indeed, in contradiction to legislative intent, it would now be an abuse of discretion in Georgia to grant a new trial if there is "material evidence" but no proof of the "purest fabrication." A trial court in DeKalb County, then, could grant a petitioner a new trial based on an ineffectiveness claim, but a trial court in Chatham County would have to deny such a right to a petitioner who

provides equally compelling evidence of innocence through recantation. Hence, Davis – a death row inmate with seven recanting witnesses and nine others implicating another – under the pure fabrication standard was arbitrarily denied his statutorily conferred right to a new trial. Indeed, he never received a hearing on the merits.

II. The Impossible High Purest Fabrication Standard Would Have Failed to Protect At Least Three Known Innocent Death Row Inmates Who Were Convicted Based On Perjured Testimony.

This standard's failure is already proven by cases of known innocents. At least three death penalty cases depended entirely on recantations to prove their innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *Ex parte Adams*, 768 S.W.2d 281 (1989); *Drake v. State*, 248 Ga. 891, 894 (1982). Each man ultimately found relief; two found relief in court, the Georgian from the Board of Pardons and Paroles. *Id.* All three men would have been executed under the purest fabrication standard.

Joseph Amrine was convicted and sentenced to death on the word of three prison inmates; all of whom ultimately recanted. If *Davis* were applied to *Amrine*, the court would have been forced to deny relief because the three recantations "do not show the witnesses' trial testimony to have been the 'purest fabrication.'" *App. A.* at 7a. Fortunately Amrine was wrongfully convicted in Missouri, not Georgia.

If proof of the purest fabrication were required in Randall Adams' case, he too would

have been executed. His conviction was based on several purported eyewitnesses. One, David Harris, later confessed and recanted his trial testimony against Adams. The court granted relief even though two other purported eyewitnesses did not recant. Adams would not have fared so well in Georgia. The belief that Harris "could subvert the ends of justice by falsely admitting the crime to others and then absenting himself" would have rendered Harris' confession meaningless. *App. A.* at 11a. Fortunately for Adams his ordeal took place in Dallas, Texas and not Savannah, Georgia.

Henry Drake was one of six *known* innocent Georgia death row inmates to ultimately secure his freedom. Drake was convicted based entirely on the uncharged perjury of the actual killer, William Campbell. The only way Drake could prove his innocence, beyond the alibi witnesses he presented at trial, was through Campbell's recantation. The Georgia Supreme Court denied him relief and held that the "effect of Campbell's new testimony was clearly to impeach the credibility of his earlier sworn statements." *Drake v. State*, 248 Ga. 891, 894 (1982).

Ultimately, Drake was pardoned.[5] Had he been required to meet the purest fabrication

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[5] The Eleventh Circuit ordered a new trial due to *Sandstrom* error and improper sentencing arguments. *Drake v. Kemp (Drake III)*, 762 F.2d 1449 (11th Cir. 1985). At retrial, he was convicted and sentenced to life. The Board freed Drake in November 1987, finding that Campbell lied. Hodes, William W., *Executing The Wrong Person*, 29 Loy. L.A. L. Rev. 1547; *Georgia's Death Row; Waiting to die*. Drake's reaction: "If I didn't have all those appeals, I'd be dead. I always thought

standard, it is unlikely that he would have been granted a hearing, which produced evidence that captured the attention of others and ultimately led to his freedom.

III. The Majority's Blind Adherence To This New Standard And Its Failure To Apply Today's Science To The Undisputed Facts, Which Demonstrate The Unreliability Of The Now-Disavowed Identification Evidence, Is Further Proof Of This Standard's Failure.

When today's accepted scientific truths are applied to the undisputed circumstances surrounding witnesses' initial observations, the reliability of their subsequent selection of Davis is greatly undermined. As a matter of science, key "estimator variables" and contaminating pre-identification exposure produced highly unreliable claims of recognition. Current science then constitutes intrinsic evidence supporting the recantations. The application of the purest fabrication standard, however, caused the court to ignore these studies, and fail to conduct hearings where these scientific studies could help establish the validity of the recantations. The court's blind adherence to the purest fabrication standard arbitrarily prevented it from considering objective proof supporting the reliability of the recantations.

A. The Court Ignored Recent Scientific Studies Establishing That The Undisputed Viewing Conditions And Circumstances Of This

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I'd be electrocuted. I worried they'd mix up the papers, and poof you're gone." *Id.*

Crime Precluded A Genuine Basis For Subsequent Recognition.

The uncontroverted evidence at trial demonstrated that the sudden unexpected assault and murder[6] in a poorly lit parking lot late at night[7] was witnessed by people under the extreme stress of being in the line of fire.[8] Scientific research demonstrates that heightened stress at the moment of perception reduces identification accuracy. Deffenbacher, K.A., et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law and Human Behavior 687 (2004). Science also confirms that which should appeal to common sense: event-related factors (e.g., duration, awareness of crime, lighting, distance/vantage point, the presence of a weapon, high levels of stress, intoxication, and other physical or mental limitations) affect the ability of a witness to accurately encode identifying information. Wells, G. L. & Olson, E. (2003). *Eyewitness identification.* Annual Review of Psychology, 54, 277-295.

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[6] Officer MacPhail was shot within seconds of the assault on Young. The shooter fled immediately.

[7] At the time of shooting the Burger King was closed and its exterior lights were turned off. The parking lot was dimly lit. According to Leo Bishop, Burger King's manager, there was enough light so that "you're not going to walk into anything or trip over anything." But it was too dark for Bishop to recognize the familiar officer as he laid in the parking lot until Bishop moved close enough (10-15 feet away) to see Officer MacPhail's uniform. The shooting occurred in "the worst area in the parking lot," as the street light on the corner was blocked by a large tree located directly underneath. According to Young, "I couldn't see, you, it was just dark, right the particular spot we were standing."

[8] Moreover, many were also intoxicated and/or injured.

1. The Extraordinarily Short Duration Of The Assault Of Young And Shooting Of Officer MacPhail Did Not Provide Sufficient Time To Encode Crucial Detail.

Common sense dictates, and science confirms, that the shorter the exposure the more difficult to encode enough information for later recognition. Memon, A., Hope, L., & Bull, R., *Exposure duration: Effects on eyewitness accuracy and confidence*, 94 British J. of Psychol. 339 (2003). The degree of a witness' attention as events unfold is as critical to the witness' ability to take in meaningful information as the duration of observation and proximity to the criminal. *See* Leippe, M.L. et al, *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identifications,* 63 J. of Applied Pyschol. 345 (1978). If a witness is unaware that a crime is occurring, interactions or mere proximity will often not leave a lasting impression. A recent Cornell study illustrates the concept of *inattention blindness.* Researchers conducted a series of experiments in which pedestrians who were giving directions to someone posing as a lost tourist did not notice when, midway through the exchange, the sham tourist was replaced by another person altogether. *Blind to Change, Even as It Stares Us in the Face*, New York Times, April 1, 2008; see also Loftus, E., *Eyewitness Testimony*, Harvard University Press, 25-27 (1996). Duration, then, should be assessed in conjunction with the time period that the witness is *paying attention* to the perpetrator.

In this case, the pistol-whipping of Young first captured the attention of the stranger

eyewitnesses. Officer MacPhail was shot within seconds of the assault on Young. The shooter fled immediately. According to Daniel Kinsman, one of Sanders' military friends in the van, the incident was "over as soon as it began." *App. A.* at 13a.

2. The Presence And Discharge Of A Gun Took Focus Away From The Face Of The Shooter.

Forensic psychologists have documented that, during a crime, the witness' attention is drawn to any visible weapon and away from the culprit's facial and physical characteristics. Experiments involving videotaped robberies with some culprits brandishing a gun and others concealing it repeatedly demonstrated that eyewitness identifications were less accurate when the gun was brandished. This is known as weapon focus effect. In a recent meta-analysis, Dr. Nancy Steblay examined 19 studies of weapon focus effect and found that "[t]he presence of a weapon does make a significant difference in eyewitness performance . . . particularly in crimes of short duration in which a threatening weapon is visible." Steblay, N. M. *A Meta-Analytic Review of the Weapon Focus Effect,* 16 Law And Hum. Behav. 413, 420-21 (1992).

In this case, even if witnesses had not sought cover, they would have instinctively focused on the gun, not the shooter's face. Given the extremely short duration of this volatile crime in which witnesses were immediately made aware of the gun, the opportunity for meaningful observations were significantly diminished. The

well-documented weapon focus effect supports the probability that some influence *other than true recognition* accounted for the witnesses' subsequent selection.

In all probability, most witnesses did *not* maintain a vantage point once the gun was displayed. Common sense dictates that people will remove themselves from the line of fire.[9] The brief duration, the weapon, and the instinctive inclination toward self-preservation, renders Murray and Williams' purported ability to "recognize" the shooter incredibl[10]

3. It Is Scientifically Impossible For Ferrell To Subsequently Recognize A

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[9] Indeed, Redd's *threat* of producing a gun caused Murray and two unidentified companions to run for cover. The sound of gunfire caused Antoine Williams to seek shelter under the dash of his car. Securing their safety ended their period of observation.

[10] Though Stephen Sanders claimed he maintained visual contact after shots were fired, he candidly admitted that night that his observations were insufficient to enable identification. Sanders was seated in a van with seven U.S. Air Force buddies ordering food at the drive thru window after a night of partying. As Young was trying to get assistance from Sanders and his friends in the van, shots suddenly rang out. Bishop told his employees and the van's occupants to duck for cover.

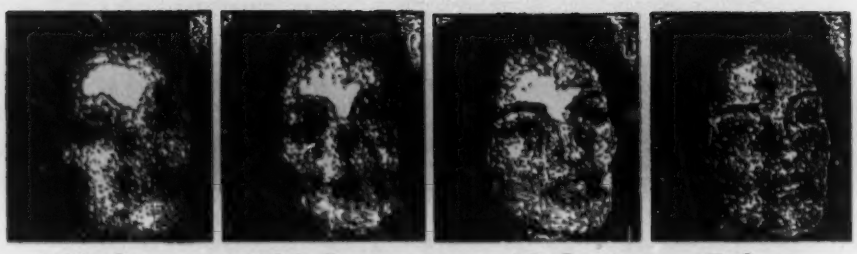
Even assuming Sanders did not heed Bishop's advice, his inability to describe the shooter beyond "a black man in twenties" and his unequivocal assertion that he "wouldn't recognize them again" rendered his in-court identification two years later extremely implausible. Indeed, his selection is the most troubling of all in a field where the competition for that distinction is at an all-time high. Something other than true recognition was at work.

Stranger Seen In A Dimly Lit Parking Lot From 160 Feet Away.

A famous woman is depicted here as she would appear from a distance of 172 feet. The lack of sufficient visual details makes identifying her a challenge beyond our human capacity. As Dr. Geoffrey Loftus states:

> When you see anything at a distance the human visual system starts to lose small details. The greater the distance the coarser the detail you lose. . . . At 10 feet you might not be able to see individual eyelashes on a person's face. At 200 feet you would not even be able to see a person's eyes. At 500 feet you could see the person's head but just as one big blur. There is equivalence between size and blurriness. By making something smaller you lose the fine detail. Loftus, G.R. & Harley, E.M., *Why Is It Easier to Identify Someone Close Than Far Away,* 12 Psychonomic Bull. & Rev. 43 (2005).

As the photos below illustrate, a known face may be clearly recognizable at 5 feet or even 43 feet; however, at distance of 100 feet or more, the fine detail necessary for true recognition is lost so that even an easily recognizable face like Julia Roberts' is but a blur. If it were possible to *recognize* the blurred woman, then her name would have occurred to the viewer immediately.



172 feet 100 feet 43 feet 5 feet

Yet, Dorothy Ferrell testified at Davis' trial that she recognized a *complete stranger* whom she viewed briefly from a distance of at least 160 feet[11] as he quickly moved about in a poorly lit parking lot with a group of other black men. The only plausible explanation is that she did not *recognize* Davis from the lot that night, but, rather, accepted Detective Wilson's suggestion when he displayed a single photo of Davis to her a few days after the shooting.

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[11] Ferrell claimed she witnessed the event from the edge of the hotel parking lot, near a palm tree, where she remained for the duration. The Thunderbird Inn is located on the southeast corner of the intersection of Oglethorpe Avenue and Fahm Street. The Burger King parking lot is located on the northeast corner of the intersection of Oglethorpe Avenue and Fahm Street. There are two small palm trees at the hotel parking edge; one is 160 feet away from the location of shooting, the other 200.

B. The Court Did Not Consider The Scientifically Supported Probability That Witnesses Selected The Police Suspect During A Suggestive Identification Process, Which Created An Ideal Situation For Memory Source Error And False Identifications.

A true identification occurs when the witness *recognizes* the person as the actual perpetrator. When the police expose witnesses to the suspect's image prior to the "official" identification procedure and make it abundantly clear that he is *the* police suspect then the witnesses' subsequent selection of that man is likely the product of the *unnecessary suggestivity* and/or *memory source error*. In other words, the witnesses did not *recognize* the suspect; instead, they simply followed the lead of the police who were determined to build a case against Troy Davis. Depending on the witnesses' motives, they may have genuinely believed that the police suspect was the man that they observed (memory source error) or they may have acquiesced out of self-interest and implicated the suspect to appease the police (false identification). The court's categorical disqualification of the recantations caused it to fail to consider this undisputed and objective corroboration of those recantations.

1. The Saturation Of Davis' Image Exposed Witnesses To A Contaminant That Increased The Probability Of Memory Source Error And Rendered The Witnesses' Later Selection Of Davis Unreliable.

Memory source error occurs when a witness incorrectly attributes a familiar face to the wrong source because he unconsciously transfers memory of the familiar face from one context to another. A witness who has seen the suspect before may, through transference, mistake him for the perpetrator in a later photo array. Decades of scientific studies reveal that prior exposure to a suspect's image will make a subsequent selection of the suspect more likely. Dysart, J., Lindsay, R.C.L., Hammond, R., Dupuis, P, *Mugshot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 Journal of Applied Psychology 1280 (2001); Loftus, E. F. & Greene, E., *Warning: Even memory for faces may be contagious*, 4 Law And Hum. Behav. 323 (1980). Ross, D. F., Ceci, S. J., Dunning. D., & Toglia, M. P., *Unconscious transference and mistaken identity: Toward a memory blending approach*, (1994) in Ross, D. F., Read, J.D., & Toglia, M. P. (Eds.) *Adult eyewitness memory: Current trends and developments* (Cambridge University Press 1994).

Prompted by Redd Coles' self-serving accusation against Davis, the police acquired Davis' photo on the evening of August 19, 1989. Yet, none of the witnesses were shown a photo array until August 24, 1989; some were not asked until August 28th and Sanders was not shown the

array until just before he testified at trial two years later. In the 5-10 day delay preceding the "official" identification process, the witnesses were repeatedly exposed to Davis' image in a variety of mediums, including Wanted Posters prominently displayed around Savannah and at their place of employment; a single photo display by Detective Wilson as he canvassed the neighborhood during the days immediately following the shooting; and through daily displays of Davis' image in print and televised news media.

Under those circumstances, even well-intentioned witnesses free from police intimidation could unconsciously transfer the memory of Davis' image.

2. Non-Blind Administration After Repeated Exposure To Davis' Image Destroyed The Procedural Protections Of A Properly Conducted Photo Array And Resulted In Unreliable Evidence Of Guilt.

The Court has long recognized the danger of misidentification brought about by suggestive identification procedures. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno* 388 U.S. 293 (1967). "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228. In *Stovall*, the Court recognized that the "the conduct of a confrontation" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. *Stovall*, 388 U.S. at 301-302.

Over the past four decades, scientific research has provided indisputable proof that eyewitnesses are vulnerable to police suggestions. See Douglas & Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect,* 20 App. Cognitive Psychol. 991 (2006); Bradfield, A.L & Wells, G.L., *'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports Of the Witnessing Experience,* 83 J. Appl. Psychol. 360 (1998); Wells, G., et al, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 22 Law and Hum.Behav. 603 (1998). This research has led scientist to recommend "blind" administration of the identification process to avoid cues that may lead a witness to falsely identify an innocent person. *Id.*

"The reason for keeping the tester blind is to prevent the tester from *unintentionally* influencing the outcome of the results." Wells, 2006 Wis. L. Rev. at 629. Double-blind administration works not only to prevent the investigator from influencing which person the eyewitness picks, but also to prevent him from "influencing the certainty of the eyewitness" by giving the witness confirming feedback. *Id.*

It is also a well-settled that a single photo display of the primary suspect, in the absence of some emergency, is unnecessarily suggestive. *Manson v. Brathwaite,* 432 U.S. 98 (1976).

In this case, non-blind administrators conducted the photo arrays on *non-blind witnesses* – everyone knew who the suspect was. The prior extensive exposure to and disclosure of

the police suspect eliminated the intended procedural benefits of a using a photo array, i.e., to accurately measure true recognition. The resulting selections are unreliable because they do not measure the witnesses' recognition of the shooter. Even setting aside the consistent reports of heavy-handed police intimidation, these identifications were extraordinarily suggestive. From a scientific perspective, the suggestive nature of this process coupled with the poor viewing conditions rendered the selections extremely unreliable evidence of guilt.

CONCLUSION

The innocent take their wrongful convictions as they come. The means by which they can prove their innocence is beyond their control. In a case of perjured testimony, a recantation may be as good as it gets. Assessing the reliability of recanting witnesses can be achieved without denying an innocent person his right to relief. Georgia's categorical exclusion of seven recantations – which, taken together, present a consistent explanation for the false trial testimony and are objectively corroborated by science – and its refusal to hear other compelling evidence of innocence constitute a denial of due process and may result in the execution of an innocent man.

Respectfully submitted,

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August 13, 2008

APPENDIX

APPENDIX A

I

SUMMARY OF BIOGRAPHIES OF MEMBERS FROM THE INTERNATIONAL LEGAL COMMUNITY JOINING IN THIS AMICUS BRIEF

Today, Europe is the only region in the world where death penalty is no longer applied. All the Council of Europe's 47 member states have either abolished capital punishment or instituted a moratorium on executions. This determination to eradicate the death penalty was reflected in Protocol No.6 to the European Convention on Human Rights. In 2002, another important step was taken with the adoption of Protocol No. 13 on the abolition of capital punishment in all circumstances, even for acts committed in time of war. The Council as well as the Euroepan Union have made abolition of the death penalty a prerequisite for membership. As a result, no execution has taken place on the territory of the organisation's member states since 1997.

The European Bars, law societies and lawyer's professional organisation aim at playing a leading role in the battle for abolition, believing that the death penalty has no place in democratic societies. They strongly supported the adoption on the 18th of December 2007, by the General Assembly, of a resolution calling for a global moratorium on executions.

Moreover, the entire european legal community calls on nations that do impose the death penalty to ensure they meet internationally agreed minimum standards on the safeguards for those facing execution. Further, European Bars and law Societies permanently ask countries to progressively restrict the use of the death penalty, such as by reducing the number of offences for which it may be imposed, and calls on those States that have abolished the practice to not reintroduce it.

England and Wales: **Paul Marsh,** President of the Law Society of England and Wales, joins in this brief on behalf of the Law Society, a professional body representing more than 138,000 solicitors in England and Wales. It is concerned to see the independence of the legal profession, the rule or law and human rights up held throughout the world.

Italy: **Aldo Bulgarelli**, a private Italian attorney and member of the ABA, Consiglio Nazionale Forense joins in his individual capacity. Mr. Bulgarelli launched a special three year long celebration by the lawyers all around the world of the anniversaries of the Universal Declaration on Human Rights (New York, 2008) and of the European Declaration on Human Rights and Fundamental Freedoms (Rome, 2010), passing

through Paris. This project was accepted by the , approved by ABA, Consiglio Nazionale Forense and the Paris Bar.

Madrid, Spain: **Juan Antonio Cremades,** President of the International Commission of the Council of the Bar of Madrid joins on behalf of that organization.

Paris, France: **Charrière Bournazel,** President of the Paris Bar joins on behalf the organization with almost 18 000 members. (Over 40% of the lawyers practicing in France are members of the Paris Bar.)

The Paris Bar is very often consulted when human rights are threatened. Whenever, throughout the world, basic freedoms are challenged on the principles of a fair hearing are hampered or even non existent. It was at the initiative of the President of the Paris bar that the International Convention to safeguard Due Process was signed by more than 58 bar associations in over 40 countries in 1987. The Paris Bar is a founding member of the World Coalition against death penalty.